No.

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD LEE TABLER,

Petitioner,

-v-

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OR THE FIFTH CIRCUIT

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Dated: April 11, 2024

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 19, 2023
Lyle W. Cayce
Clerk

No. 22-70001

RICHARD LEE TABLER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:10-CV-34

Before GRAVES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:[*]

The district court granted petitioner Richard Tabler a partial Certificate of Appealability ("COA") to appeal that court's denial of his habeas corpus petition. The COA covers two issues: first, whether Tabler's state habeas counsel abandoned him or otherwise performed deficiently by not challenging his competency to waive further habeas proceedings; and

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

second, whether Tabler was prejudiced by his trial counsel's failure to object to victim-impact evidence at the punishment phase of his capital murder trial. Addressing the first issue only, we conclude that Tabler's state habeas attorneys neither abandoned him nor rendered ineffective assistance by not contesting his competency to waive further habeas proceedings. Tabler therefore fails to show "cause" under *Martinez v. Ryan*, 566 U.S. 1 (2012), for procedurally defaulting his claim regarding his trial counsel's performance. We therefore do not address that claim.[1]

The district court's judgment denying Tabler's habeas corpus petition is AFFIRMED.

I.

A.

We have previously recited the facts regarding Tabler's 2007 conviction and death sentence for shooting two people to death. *See Tabler v. Stephens*, 588 F. App'x 297, 298–99 (5th Cir. 2014) ("*Tabler I*"), *vacated in part by* 591 F. App'x 281 (5th Cir. 2015) ("*Tabler II*"). Relevant to this appeal, in addition to those murders, Tabler was also indicted for murdering two young women for spreading news of his crimes. Those charges were eventually dismissed. During the punishment phase at Tabler's trial, however, the court allowed the women's relatives to testify about the effect their deaths had on family and friends. Tabler's trial counsel did not object to this evidence.

[1] We DENY Tabler's pending motion to expand the COA to include additional grounds.

Additionally, Tabler's trial counsel presented mitigating evidence at the punishment phase in an attempt to show that Tabler was "not normal." *Ibid.* This evidence included:

> (1) [T]estimony from Tabler's mother and sister about his difficult childhood, potential birth trauma, and history of psychiatric treatment; (2) testimony from Dr. Meyer Proler, a clinical neurophysiologist, concerning an abnormality of the left temporal frontal region of Tabler's brain that causes difficulty learning, planning, and weighing the consequences of actions; (3) testimony from Dr. Susan Stone, a psychiatrist, that Tabler suffered from a severe case of attention deficit hyperactivity disorder, borderline personality disorder, and a history of head injuries, all of which inhibited his ability to rationally assess situations and control his impulses; and (4) testimony from Dr. Deborah Jacobvitz, a psychologist, regarding the impact of parental neglect and abandonment on Tabler's development.

Ibid.

B.

The Texas Court of Criminal Appeals ("CCA") upheld Tabler's conviction and death sentence on direct appeal. *See Tabler v. Texas*, No. 75,677, 2009 WL 4931882 (Tex. Crim. App. Dec. 16, 2009), *cert. denied*, 562 U.S. 842 (2010). While that appeal proceeded to the CCA, Tabler went back and forth on whether to waive further state habeas proceedings. Before he ultimately waived these rights, his state habeas counsel retained an investigator and a mitigation specialist. The mitigation specialist spent about thirty hours working on Tabler's case; she met with him, reviewed the trial record, and communicated with habeas counsel.

Habeas counsel also received funds to have Tabler examined by a psychologist. In 2008, the court authorized Dr. Kit Harrison to "conduct[] a

neuropsycho[lo]gical evaluation appropriate in assisting counsel for the Defendant in the preparation of the defense." The court also asked Dr. Harrison to provide an opinion on Tabler's legal competency. About a month after his visit to Tabler in prison, Dr. Harrison sent a two-page letter to Tabler's counsel stating that Tabler was "forensically competent to make decisions to suspend his automatic appeal." Just over a month later, Dr. Harrison completed a report containing the results of Tabler's neuropsychological evaluation. The report noted that "Tabler demonstrate[d] a deep and severe constellation of mental illnesses" and "rapid-cycling mood destabilization with strong evidence of Bipolar Disorder, Type I." The report did not speak to Tabler's competency to waive his habeas rights. Tabler eventually wrote to the CCA, stating, "I wish to drop all my appeals & get an execution date."

The state court held a hearing to determine whether Tabler was competent to waive further habeas proceedings. Habeas counsel provided the court with Dr. Harrison's letter opining that Tabler was indeed legally competent. Counsel did not, however, provide the court with Dr. Harrison's subsequent report containing the results of his neuropsychological evaluation.

When asked at the hearing whether "the defense [was] ready to proceed," following Tabler's directive that he wished to waive his rights, his attorneys stated that they did "not announce ready[] because [they did] not intend to take a position one way or the other of what should happen." Counsel had told Tabler before this hearing that they did not think it was their job to help Tabler drop his habeas petition but neither was it their job to pursue habeas relief against Tabler's wishes. If the court asked whether they thought Tabler was competent to make this decision himself, counsel told him, they would tell the court that he was, "but that [would] be the extent of [their] involvement."

Counsel took no part in the ensuing colloquy between Tabler and the court, where Tabler stood by his decision to waive further habeas proceedings. After this conversation, the court permitted Tabler to waive his state habeas rights, and the court relieved counsel from any further obligation to investigate the case. Tabler was therefore without representation when his deadline for filing a state habeas elapsed in November 2008.

Nine months after the competency hearing and eight months after his state habeas petition was due, Tabler changed his mind. In a letter to the court, he asked to "pick all my appeals back up." On July 14, 2009, well past the forty-five-day deadline to file a state habeas petition, Tabler's state habeas counsel filed a motion to resume representation and establish a new filing date. The motion contended Tabler had been incompetent to waive his habeas rights. The CCA denied the motion, concluding that Tabler failed to show good cause because "his failure to file a timely writ of habeas corpus was attributable to his own continued insistence on foregoing that remedy." *Tabler I*, 588 F. App'x at 300.

C.

After the CCA denied Tabler's direct appeal and his motion to establish a new state habeas filing date, Tabler wrote a letter protesting a stay of execution in his case and requesting an execution date, which was effectively an expression of his desire to waive his federal habeas rights. The federal district court appointed Dr. Richard Saunders to perform a psychological evaluation before a competency hearing. Dr. Saunders found Tabler competent to waive further proceedings but concluded that his desire to waive was the result of the conditions of his confinement and his treatment by staff and other inmates. Accordingly, the district court ordered Tabler's federal habeas case to proceed because his previously expressed desire to waive had not been voluntary.

In 2012, the district court denied Tabler's federal habeas petition, which included a claim for ineffective assistance of trial counsel ("IATC"). The court rejected this claim because "the failure to exhaust" in state court "was due to [Tabler's] choice," and thus there was "no good cause to" justify allowing him to return to state court to exhaust this claim. Tabler's attorneys then moved to withdraw on the ground that new counsel was needed to offer unconflicted arguments about the impact of the Supreme Court's then-recent decision in *Martinez*. The court appointed new counsel for appeal.

We denied Tabler's request for a COA and affirmed the district court's denial of habeas relief. *See id.* at 298–99. A few months later, however, we reversed course, opting to remand for the district court to "consider in the first instance whether Tabler, represented by his new counsel . . . or other unconflicted counsel, can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief." *Tabler II*, 591 F. App'x at 281. Tabler filed an amended federal habeas petition addressing ineffectiveness of both state habeas counsel and state trial counsel under *Martinez*.

The district court ruled that Tabler did not demonstrate cause and prejudice under *Martinez*. The court determined that his state habeas attorneys were not deficient and, in the alternative, Tabler was not prejudiced by their conduct. Additionally, the court found that Tabler's trial attorneys were not ineffective.

The district court granted a partial COA to consider the effectiveness of state habeas counsel when they chose not to challenge Tabler's competency to waive further habeas proceedings. The COA also covered whether Tabler was prejudiced under *Strickland v. Washington*, 466 U.S. 668

(1984), when trial counsel did not object to the victim-impact evidence at punishment. Tabler unsuccessfully moved to alter or amend the judgment and to expand the COA under Federal Rule of Civil Procedure 59(e). This appeal followed.

II.

When reviewing a district court's denial of a writ of habeas corpus, we review the court's "factual findings for clear error and its legal conclusions *de novo*." *Mullis v. Lumpkin*, 70 F.4th 906, 909 (5th Cir. 2023). We also apply *de novo* review to mixed questions of law and fact "by independently applying the law to the facts found by the district court, as long as the district court's factual determinations are not clearly erroneous." *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir. 2005). "Ineffective-assistance-of-counsel claims are mixed questions of law and fact." *Mullis*, 70 F.4th at 909.

III.

On appeal, Tabler argues that he can show cause under *Martinez* for procedurally defaulting his IATC claim because his state habeas counsel both abandoned him and also performed deficiently at his competency hearing. The district court rejected these arguments. At *Martinez* prong one, the court ruled that Tabler's habeas attorneys neither abandoned him nor performed deficiently. Additionally, at *Martinez* prong two, the court ruled that Tabler could not support his underlying IATC claim. We limit our analysis to the court's *Martinez* prong-one ruling, which we affirm.[2]

[2] In *Mullis*, we recently clarified that our precedent was not abrogated by *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), and thus permits consideration of "evidence outside the state record . . . in *Martinez* claims for the limited purpose of establishing an excuse for procedural default." *Mullis*, 70 F.4th at 910–11 (citing *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016)). *Mullis* does not affect this case, however, because the district court considered evidence beyond the state record in finding no cause under *Martinez*.

A.

Federal courts are authorized "to issue habeas corpus relief for persons in state custody" by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Harrington v. Richter*, 562 U.S. 86, 97 (2011). A petitioner must first exhaust all available state court remedies. 28 U.S.C. § 2254(b)(1)(A). The Supreme Court, however, recognizes "an important corollary to the exhaustion requirement: the doctrine of procedural default." *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (citations and internal quotation marks omitted). Under this doctrine, a petitioner defaults his federal claims if he does not first assert them in state court consistent with state procedural rules. *Ibid.*

Tabler argues the procedural default of his IATC claim should be excused due to state habeas counsel's ineffectiveness. He can overcome procedural default only by showing (1) "cause for the default" and (2) "actual prejudice" resulting from "the alleged violation of federal law." *Id.* at 379 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). "Cause" means that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the State's procedural rule." *Ibid.* (citation omitted). An external factor is one that "cannot fairly be attributed to" the petitioner. *Coleman*, 501 U.S. at 753. To establish "actual prejudice," a petitioner "must show not merely a substantial federal claim, such that the errors at trial created a *possibility* of prejudice, but rather that the constitutional violation worked to his *actual* and substantial disadvantage." *Shinn*, 596 U.S. at 379–80 (cleaned up) (citation omitted).

Ordinarily, state habeas counsel's "ignorance or inadvertence" does not establish "cause" to excuse procedural default because the petitioner bears the risk of attorney error. *Id.* at 380 (citing *Coleman*, 501 U.S. at 753). But the Supreme Court carved out a "narrow exception" to this rule in

Martinez. 566 U.S. at 9. The Court held "that ineffective assistance of state postconviction counsel may constitute 'cause' to forgive procedural default of a trial-ineffective-assistance claim." *Shinn*, 596 U.S. at 380. The *Martinez* exception applies if the procedurally defaulted claim is IATC and "if the State's judicial system effectively forecloses direct review of trial-ineffective-assistance claims." *Ibid.* (citing *Trevino v. Thaler*, 569 U.S. 413, 428 (2013)); *see also Trevino*, 569 U.S. at 428 (holding Texas's judicial system satisfies this requirement). To establish "cause" under *Martinez*, we apply the familiar *Strickland* test. *See Martinez*, 566 U.S. at 14. Accordingly, the petitioner must show habeas counsel's performance was (1) "deficient" and (2) "prejudiced" his defense. *Strickland*, 466 U.S. at 687.

Another way to show "cause" under *Martinez* is attorney abandonment. *Maples v. Thomas*, 565 U.S. 266, 281 (2012). An attorney who "abandons his client without notice, and thereby occasions" default, severs "the principal-agent relationship." *Ibid.* A client therefore "cannot be charged with the acts or omissions of an attorney who has abandoned him," nor "faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Id.* at 283.

B.

We first address whether Tabler's state habeas attorneys were deficient under *Strickland* or abandoned him as in *Maples*. Tabler argues that habeas counsel performed deficiently by not challenging his competency to waive further state habeas proceedings and by failing to properly investigate his competency, thus satisfying *Strickland* prong one. *See Strickland*, 466 U.S. at 687. He largely relies on the same argument to show habeas counsel abandoned him. *See Maples*, 565 U.S. at 283. We disagree on both counts.

Counsel performs deficiently under *Strickland* by falling "below an objective standard of reasonableness." 466 U.S. at 688. In assessing

counsel's performance, however, courts must be "highly deferential," look to "the totality of the evidence," must eliminate the "distorting effects of hindsight," and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 695.

According to Tabler, his habeas attorneys performed deficiently by attending the competency "hearing as spectators rather than participants and wash[ing] their hands of Mr. Tabler." He also claims their investigation of his mental capacity was insufficient in light of their knowledge of the mental challenges he faced. Instead of "offer[ing] no resistance to their client's efforts to waive" his rights, Tabler argues his attorneys should have had him evaluated by a second psychologist to contest the opinion of Dr. Harrison.[3]

Texas law allows prisoners to waive state habeas review. *Ex parte Reynoso*, 228 S.W.3d 163, 165 (Tex. Crim. App. 2007) (per curiam). Prisoners may also waive state habeas representation, provided the waiver is "intelligent and voluntary." TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2(a); *see also Ex Parte Gallo*, 448 S.W.3d 1, 5 n.23 (Tex. Crim. App. 2014); *Mullis*, 70 F.4th at 912 n.6 (noting "[t]he competency inquiry differs from the knowing-and-voluntary inquiry," but, given the petitioner's arguments, "the distinction is irrelevant here"). The Fifth Circuit describes the postconviction competency inquiry as follows: (1) Does "the individual suffer from a mental disease, disorder, or defect?"; (2) Does "that condition prevent him from understanding his legal position and the options available

[3] Tabler also argues that habeas counsel failed to object to the state court's incorrect implication that his habeas deadline would occur after the CCA decided his direct appeal. We disagree. Habeas counsel repeatedly told Tabler that he needed to decide whether to proceed on state habeas long before his direct appeal was resolved. In one letter, in fact, Tabler's counsel told him that waiting until the CCA decided his direct appeal would occur well after they would have to file a habeas application.

to him?"; (3) Does "that condition nevertheless prevent him from making a rational choice among his options?" *Mullis*, 70 F.4th at 912 (citing *Mata v. Johnson*, 210 F.3d 324, 328 (5th Cir. 2000)).

Considering all the circumstances, Tabler has not cleared "*Strickland*'s high bar" to show state habeas counsel's performance was objectively unreasonable. *See Harrington*, 562 U.S. at 105 (citation omitted); *see also Strickland*, 466 U.S. at 695. To the contrary, his habeas attorneys followed his explicit wish to drop further habeas proceedings, reasonably finding him "competent to make this decision" for himself. *Cf. Wood v. Quarterman*, 491 F.3d 196, 203 (5th Cir. 2007) ("Neither the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence."). Throughout these proceedings, the trial court, the CCA, the federal district court, and the multiple mental health professionals that evaluated Tabler found him mentally competent to make substantive decisions surrounding his case.

In *Mullis*, we rejected an argument nearly identical to Tabler's. 70 F.4th at 911–14. There, petitioner argued his habeas counsel failed to challenge his waiver of habeas proceedings at a competency hearing and failed to give the court-appointed mental health expert all "relevant mental-health records, trial transcripts, and other information" the petitioner thought "'critical' to the evaluation." *Id.* at 912. We held that, "[g]iven the context, the habeas attorneys were reasonable in not challenging" the expert's conclusions about petitioner's competency. *Id.* at 913. Moreover, habeas counsel's decision was supported by the fact that counsel engaged a mental health expert and that there had been no previous finding that petitioner was incompetent to make decisions in his case. *Id.* at 914 ("[Petitioner's] habeas attorneys provided reasonably effective representation, even if their efforts were sometimes imperfect. The

investigation into [petitioner's] competence was adequate, given the available facts.").

Mullis is on all fours here. Just as in that case, Tabler "endured his entire trial without being found legally incompetent by the court," and the same judge who presided over the trial also presided over the competency hearing. *Id.* at 913. It was entirely reasonable, then, for Tabler's habeas counsel to "merely acquiesce[] to [Tabler's] wishes in light of a court-appointed expert's finding that [Tabler] was competent—wishes that are permissible given that defendants need not pursue habeas relief at all." *Id.* at 914. Most importantly, Dr. Harrison, the psychologist hired to review Tabler's competency to waive further habeas proceedings, concluded that Tabler was "forensically competent to make decisions to suspend his automatic appeal."

Tabler argues that Dr. Harrison's two-page letter was not thorough enough to be reasonably relied upon by counsel. *Cf., e.g.*, *Mullis*, 70 F.4th at 912 (court-appointed psychiatrist provided "a twenty-page report" explaining why the petitioner "was competent to waive his right to habeas review"). But the *length* of Dr. Harrison's letter did not determine whether counsel was reasonable in relying on it. As shown by Dr. Harrison's follow-on eighteen-page neuropsychological report stemming from the same evaluation, Dr. Harrison was well aware "of the contours of [Tabler's] diagnoses and mental-health history." *Id.* at 913; *see also Roberts v. Dretke*, 381 F.3d 491, 499 (5th Cir. 2004) ("[I]t is clear from Dr. Arambula's report that the doctor was well aware of the fact that Roberts had previously had suicidal thoughts."). Given that Dr. Harrison had the full picture of Tabler's mental health, it was reasonable for habeas counsel not to challenge Dr. Harrison's conclusions as to Tabler's competency.

Tabler also argues habeas counsel should have been on "notice" that his waiver was suspect because they knew about his extensive history of mental challenges. We disagree. Even assuming counsel doubted Tabler's competency to waive habeas, they reasonably cured that suspicion by outsourcing the question to a mental health professional. And contrary to Tabler's assertion, given these circumstances, habeas counsel had no duty to continue searching for a psychologist to contradict Dr. Harrison's opinion. *See Mullis*, 70 F.4th at 913 (holding, though "the opinion of a court-appointed psychiatrist does not always exonerate counsel of any duty to investigate further," given similar circumstances to here, the petitioner's "habeas attorneys did not have a duty to investigate more than they did").

Finally, Tabler's attempt to tar his counsel's performance as "abandonment" also misses the mark. The paradigm abandonment case, *Maples*, is nothing like this one. *See Maples*, 565 U.S. 266. Maples's attorneys left their law firm without informing Maples, and no other attorney stepped in to represent him. *Id.* at 283–84, 274. At the time of the procedural default, then, Maples had no way of knowing his attorneys were no longer representing him. *Id.* at 289.

The conduct of Tabler's habeas counsel is worlds away from the abandonment in *Maples*. Tabler's lawyers hired an investigator, a mitigation specialist, and a psychologist for a neuropsychological evaluation. They also attended the competency hearing and respected Tabler's desire to waive further proceedings. And although Tabler was technically unrepresented when his state habeas filing date expired in November 2008, he had ample notice that he would be proceeding without counsel. *Contra id.* at 281 (holding abandonment excuses default "when an attorney abandons his client *without notice*" (emphasis added)). Counsel informed Tabler before the competency hearing that he would not be arguing for or against Tabler's decision to waive further proceedings. Moreover, Tabler agreed that he did

not "want to continue [his] appeals after [his] direct appeal has concluded," he understood his attorneys had "time constraints" for filing a state writ of habeas corpus, and yet he stated, "There's nothing really more [that] needs to be said. I thanked [my attorneys] for what they did. I'm ready to go. Let's get this done." Even after this, his habeas counsel agreed to be available on standby and to remain as his lawyer, even if not formally because he was not filing a state habeas petition. In short, there was no abandonment.

C.

Tabler separately contends that his habeas attorneys performed deficiently by not giving the state judge all pertinent information about his mental health. We need not decide whether the attorneys were deficient in this regard because Tabler has not shown any prejudice, thus failing *Strickland* prong two. 466 U.S. at 687.

Tabler asserts that, if counsel had given the state judge Dr. Harrison's eighteen-page report containing the results of his neuropsychological examination, the judge would not have found him competent to waive further habeas proceedings. Although the report addressed issues separate from Tabler's competency, Tabler argues the report nonetheless contained information relevant to whether he could rationally choose among options. The federal district court rejected these arguments. It found that, even if counsel had provided the state court with Dr. Harrison's full report, there is no substantial likelihood that the court would have found Tabler incompetent to waive habeas. We agree with the district court.

Prejudice under *Strickland* means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also Harrington*, 562

U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

Dr. Harrison's report depicted a "deep and severe constellation of mental illnesses described on Axis I [that] have been disabling and debilitating for [Tabler] since at least early adolescence and have never been adequately managed from a medical or psychological standpoint." The report also identified "rapid-cycling mood destabilization" in Tabler, "with strong evidence of Bipolar Disorder, Type I." Had the state court seen this report—along with other convincing evidence that Tabler's waiver was driven by "severe mental illness"—Tabler argues it is probable that the court would not have found him competent to waive his state habeas rights. We disagree.

Tabler has not shown a substantial likelihood that the outcome would have been different had the state court seen this report. *See Harrington*, 562 U.S. at 112. Dr. Harrison was the same psychologist who authored a letter specifically opining that Tabler was mentally capable of waiving his state habeas rights. Furthermore, the judge at the competency hearing was the same judge that presided over Tabler's murder trial, where his attorneys presented evidence of mental incapacity similar to that provided in Dr. Harrison's eighteen-page report. *See Dennis ex rel. Butko v. Budge*, 378 F.3d 880, 894 (9th Cir. 2004) ("[J]udges who have an opportunity to observe and question a prisoner are often in the best position to judge competency, especially . . . where the judge has had more than one opportunity to observe and interact with the prisoner."). This evidence included multiple doctors testifying about Tabler's extensive history of mental challenges. Faced with that knowledge, in addition to its colloquy with Tabler at the competency hearing, the state court accepted Dr. Harrison's opinion and found Tabler competent to waive further proceedings.

Accordingly, we hold that Tabler has not shown a substantial likelihood that the full report from Dr. Harrison would have changed the outcome of the competency hearing. *See Strickland*, 466 U.S. at 694. Therefore, he cannot show cause under *Martinez* to overcome the procedural default of his IATC claim.

IV.

The district court's judgment denying Tabler's petition for writ of habeas corpus is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

RICHARD LEE TABLER,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL ACTION NO. W-10-CA-034-RP**
	§	
BOBBY LUMPKIN,[1] Director,	§	*** DEATH PENALTY CASE ***
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Richard Lee Tabler was convicted of capital murder and sentenced to death in March 2007. After waiving his right to seek habeas corpus relief in state court, Petitioner unsuccessfully sought federal habeas corpus relief in this Court. On appeal, the Fifth Circuit Court of Appeals vacated, in part, the district court's judgment and remanded for consideration of whether (1) Petitioner can establish cause for the procedural default of any ineffective-assistance-of-trial counsel ("IATC") claims he may raise, and (2) if so, whether those claims warrant relief on the merits.

Currently before the Court on these issues are Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 90), Respondent's Answer (ECF No. 99), and Petitioner's Reply (ECF No. 132). Having considered the record and voluminous pleadings submitted by both parties, the Court finds that (1) Petitioner fails to establish cause or prejudice to excuse the procedural default of his new IATC claims and (2) in the alternative, each of the IATC claims lack merit.

[1] The previous named Respondent in this action was Lorie Davis. On August 10, 2020, Bobby Lumpkin succeeded Davis as Director of the Texas Department of Criminal Justice, Correctional Institutions Division. Under Rule 25(d) of the Federal Rules of Civil Procedure, Lumpkin is automatically substituted as a party.

For these reasons, the Court concludes Petitioner is not entitled to federal habeas corpus relief or a certificate of appealability.

I. Background

A. The Offense

In February 2005, Petitioner was indicted for capital murder for the 2004 shooting deaths of Mohamed–Amine Rahmouni and Haitham Zayed. 1 CR 1-2.[2] Following a three-day trial, Petitioner was found guilty of the charged offenses. 1 CR 249; 24 RR 51-52. The Texas Court of Criminal Appeals ("TCCA") summarized the evidence presented at Petitioner's trial:

> Mohamed–Amine Rahmouni managed a topless bar called Teazers, where [Petitioner] worked until he and Rahmouni had a conflict. Rahmouni allegedly told [Petitioner] that he could have [Petitioner]'s family wiped out for ten dollars.
>
> [Petitioner] decided on November 18, 2004, that he would kill Rahmouni after Thanksgiving. In preparation for killing Rahmouni, [Petitioner] borrowed a 9–millimeter gun, a camcorder, and a pickup truck. Then, on the night of November 25, 2004, which was Thanksgiving Day, [Petitioner] called Rahmouni with an offer to sell him cheap stereo equipment and told him they would meet in the parking lot of a local business. Haitham Zayed drove Rahmouni to the parking lot to meet [Petitioner] around 2:00 a.m. on Friday morning. [Petitioner] and his friend Timothy Payne were waiting for them in the truck that [Petitioner] had borrowed. As soon as Zayed's car stopped, [Petitioner] shot Zayed and then Rahmouni. He then exited the truck and pulled both men from the car. He saw that Rahmouni was still alive, so he shot him a second time. He had Payne videotape part of the shooting. Later that day, the videotape was destroyed after [Petitioner] showed it to a friend. [Petitioner] took a wallet and a black bag that he found inside the car. On the following Sunday night, [Petitioner] was arrested, and in the early morning hours of Monday, November 29, he confessed to the shootings.

Tabler v. State, No. 75,677, 2009 WL 4931882, at *1 (Tex. Crim. App. Dec. 16, 2009).

[2] Throughout this opinion, "CR" refers to the Clerk's Record of Petitioner's trial while "RR" refers to the Reporter's Record. Both are preceded by volume number and followed by the relevant page numbers.

B. The Punishment Phase

The punishment phase of Petitioner's trial began March 26, 2007. 25 RR 4. The State gave a brief opening statement summarizing the evidence it intended to present, while defense counsel reserved their opening statement for later. Over the course of the next five days, the jury then heard testimony from twenty-three witnesses presented by the prosecution followed by six witnesses presented on behalf of the defense.

1. Evidence Presented by the State

At punishment, the State presented evidence that Petitioner confessed—in writing and by videotaped statement—to murdering two Teazers employees, Amanda Benefield and Tiffany Dotson, just two days after murdering Rahmouni and Zayed. 26 RR 163-81; State's Exhibit (SX) 64, 114. According to Petitioner, Benefield and Dotson were on a list of eleven Teazers employees that he intended to kill. In his written statement, Petitioner admitted he lured the women out to the lake with the promise of drugs, accused them of telling people that he had killed Rahmouni and Zayed, and then shot both women multiple times. *Id.* A ballistics expert concluded the same pistol used to murder Rahmouni and Zayed was used in the killing of Benefield and Dotson. 26 RR 133-36. Petitioner's friend and roommate, Kim Geary, testified that Petitioner bragged about the murders to her later that evening, and that she believed what he said because Petitioner had already shown her a video recording of the previous murders prior to destroying the video. *Id.* at 137-43.

The State also presented evidence that Petitioner called the Bell County Sheriff's Office the night after he murdered Rahmouni and Zayed. 26 RR 5-15; SX 64. Petitioner described the murders and then stated he was at Teazers planning his next double homicide. He also threatened to "pick off" undercover officers at the club. A day later, following the murders of

Benefield and Dotson, Petitioner again called the Sheriff's Office to taunt them about the new killings. 26 RR 31. Petitioner told police about "another one with five shots," and threatened to kill the rest of the Teazers' employees if police failed to close the club. He also threatened to come after the police.

The jury heard further testimony regarding Petitioner's history of threatening law enforcement officers and fellow inmates. After being arrested in 2003 for a parole violation, Petitioner escaped from a patrol car while handcuffed, kicked the windows out of another patrol car after he was again detained, and later threatened his parole officer by stating he would "take care of [him] and [his] family." 25 RR 11-16, 24-30. In September 2004, Petitioner threatened a Michigan police officer investigating a home invasion, telling the officer over the phone that he would "find out [his] full name, [his] social security number, [his] family members' names and somebody would get hurt" if the officer did not drop the investigation immediately. *Id.* at 43-44.

A few months later, after giving the above confession, Petitioner told the investigating officer that if anyone messed with him while in jail "he would break their neck in 27 places." 26 RR 177. While in the Bell County Jail awaiting trial, Petitioner was overheard threatening to harm several officers if given the opportunity. 25 RR 53-58, 65, 69-73, 79-88. In one instance, Petitioner described an officer's home and family before stating that the officer "was going to have to watch what [Petitioner] did to [her] children before he would kill [her] because it would be more torture for [her]." *Id.* at 71.

Lastly, the jury heard the testimony of A.P. Merillat, an investigator with the Special Prosecution Unit charged with investigating and prosecuting crimes within the Texas prison system. 27 RR 11-29. Merillat testified generally about the prison classification system in

Texas and the numerous opportunities prisoners have to commit criminal acts of violence despite the heightened security measures in place.

2. Evidence Presented by the Defense

In a brief opening statement, defense counsel stated their intention was to demonstrate Petitioner was "not normal" and thus was undeserving of the death penalty. 27 RR 69-72. To do so, the defense first presented the testimony of Petitioner's mother and sister regarding Petitioner's difficult childhood, potential birth trauma, and history of psychiatric issues. *Id.* at 73-170.

Lorraine Tabler, Petitioner's mother, described her troubled marriage with Petitioner's father, Robert Tabler, and the lack of structure in Petitioner's life during his childhood. According to Lorraine, Robert worked long hours, traveled frequently, was unfaithful, and drank excessively. Her pregnancy with Petitioner was unplanned and Robert wanted her to have an abortion, but she refused. Once Petitioner was born, Robert took little interest in him and did not treat him the same as he treated their other children. When Petitioner was a year old, Lorraine went back to work and left Petitioner in the care of his seven-year-old sister and nine-year-old half-brother. Lorraine decided to leave when Petitioner was ten years old and drove away after rebuffing Petitioner's pleas to take him with her. Although she returned two years later, she left for good after a few months and only saw the children sporadically thereafter. At some points during his adolescence, Petitioner lived with Lorraine in both Florida and Nevada, but most of the time he lived with his father in California.

Lorraine further testified Petitioner turned blue, almost black, after he was born because he had taken a lot of fluid into his lungs. As a child, Petitioner did poorly in school, had trouble paying attention, and had to repeat the third grade. As a teenager, he once fell out of a tree and

was knocked unconscious. Petitioner only had one friend growing up and was not attached to anyone other than herself and his sister. Lorraine noted Petitioner always had a quick temper: "[e]verything goes good for a while and then he just blows up." *Id.* at 96. Although Lorraine believed Petitioner is a very loving and affectionate person most of the time, he also is very impulsive and becomes angry in the spur of the moment. In her opinion, Petitioner did not endure a normal childhood, probably feels abandoned by her and the rest of his family, and is not the way he is by choice.

Petitioner's older sister, Christina Martinez, also testified about the lack of structure during Petitioner's childhood. Christina was seven years old when Petitioner was born and essentially became his primary caregiver shortly thereafter because of her parents' work schedule and rocky marriage. Neither parent was around very much, especially Petitioner's father, and their mother left when Petitioner was around nine or ten years old. As a result, Petitioner led a lonely existence and was always seeking attention from Christina and her friends. Other than Christina, Petitioner only had one friend growing up. To her, Petitioner's childhood was "painful" because he was not nurtured and no one, other than her, was there to guide him through life. *Id.* at 135.

Christina described Petitioner as "not normal" because even as a child he was constantly in need of love and attention. *Id.* at 124. Petitioner struggled in school because he could not sit still and would "wreak havoc" in the classroom to get attention—his education probably did not progress past the fourth grade. *Id.* at 137. Christina also believed that psychological issues prevented Petitioner from being normal and that his parents or teachers should have sought professional help for Petitioner at an early age. By the time Petitioner received a diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) at age twelve, it was too late. Petitioner

always had trouble controlling his emotions, even as an infant, and would be upset one moment and then very loving a second later. Christina believed Petitioner's psychological issues stemmed, in part, from brain damage he sustained at birth as a result of lack of oxygen to the brain. In addition, Petitioner injured his head on three different occasions as a teenager. In her opinion, Petitioner has the mental age of a thirteen year old and, through no fault of his own, lacks the ability to live in society.

Following the testimony of Petitioner's mother and sister, the defense presented the testimony of several mental health experts to demonstrate how Petitioner is "not normal" and to explain "why he is the way he is." 28 RR 7-149. Dr. Meyer Proler, a clinical neurophysiologist, interpreted an EEG that was given to Petitioner in September 2005 while he was awaiting trial. Dr. Proler found evidence of an abnormality, likely damage, in the left frontal temporal area of Petitioner's brain. According to Dr. Proler, the frontal lobes are what makes us "particularly human" because they give us the ability to predict, plan, and to understand the meaning of words and possibly their emotional content. *Id.* at 17. Dr. Proler would not state beyond a reasonable medical certainty Petitioner has brain damage, only that there was evidence of an abnormality.

The defense next presented Dr. Susan Stone, a psychiatrist and attorney who conducted a psychiatric interview with Petitioner and reviewed seven volumes of Petitioner's social history, school, jail, and medical records prior to testifying. Dr. Stone came to several conclusions concerning Petitioner, the first of which is that Petitioner "was raised in a very neglectful household with very turbulent parents who were kind of consistently abandoning and neglecting him." *Id.* at 32. Dr. Stone next agreed with prior diagnoses that Petitioner suffered from severe ADHD, which made it difficult for Petitioner to control his impulses and rationally assess circumstances, as well as bipolar disorder, which caused mood swings and hallucinations severe

enough to require Petitioner's hospitalization on numerous occasions while he was in the California prison system.

In addition to these "biologic" mental illnesses, Dr. Stone also diagnosed Petitioner as suffering from borderline personality disorder, a "characterologic" illness, due to Petitioner's impulsivity and history of attention-seeking behavior such as self-mutilation and suicidal gestures. *Id.* at 33. She also noted that Petitioner had a history of head injuries and that his EEG indicated a possibility of underlying brain damage. In conclusion, Dr. Stone testified that the combination of the issues "resulted in a real inability for [Petitioner] to rationally assess situations and to use good judgment, to abstract from his mistakes and to control his impulses." *Id.* at 34.

The defense concluded with the testimony of Dr. Deborah Jacobvitz, a professor and child psychologist who specializes in child development and early parent-child relationships. Dr. Jacobvitz testified that Petitioner's childhood history of emotional neglect could have resulted in behavioral or emotional problems, a lack of conscience, or an inability to empathize with other people. She identified several factors from Petitioner's childhood that may have affected his development which she gathered from Petitioner, his mother and father, his sister, and his school and medical records.[3] According to Dr. Jacobvitz, neglect and emotional abuse like that Petitioner suffered "seems to be more damaging and more devastating for children than being physically abused or sexually abused." *Id.* at 119. Although she was not surprised that Petitioner turned out the way he did, she was not there to defend Petitioner or state that he is not

[3] These factors included: his father's disinterest; his mother's emotional unavailability; the fact that his sister essentially raised him until he was seven and then effectively abandoned him once she reached high school; his parents' separation when he was nine; and his parents' failure to get Petitioner psychological help until he was around fifteen.

responsible for his conduct. Rather, she was only trying to help the jury understand his childhood in order to "have a better sense of why he might have did what he did." *Id.* at 130-31.

3. Rebuttal and Closing

In rebuttal, the State called Dr. Richard Coons, a forensic psychiatrist. 28 RR 151-85. Dr. Coons interviewed Petitioner prior to trial and reviewed the same records as Dr. Stone. While Dr. Coons agreed with Dr. Stone that Petitioner suffered from ADHD, he testified that his primary diagnosis was that Petitioner has antisocial personality disorder (ASPD)—what used to be termed sociopathy or psychopathy. Among other traits, people associated with this diagnosis display a pervasive pattern of disregard for the rights or feelings of others at an early age and are deceitful, manipulative, impulsive, and indifferent to the consequences of their actions. Petitioner displayed almost all of the traits associated with ASPD.

Dr. Coons disagreed with Dr. Stone's diagnosis of bipolar disorder because the data did not support that conclusion and Petitioner never responded to any of the medication (for bipolar disorder) he was given while in the California prison system. He also believed Petitioner's abnormal EEG was a "red herring," as people with frontal lobe damage generally do not read and write well while Petitioner was a prolific writer whose letters all make sense. *Id.* at 178. Instead, Dr. Coons felt very strongly that ASPD was the primary diagnosis for Petitioner, stating "it's hard to find anybody who fits it any better than [Petitioner] does." *Id.* at 165. He cautioned, however, that people with ASPD do not lack free will and are not compelled to commit criminal acts; rather, they choose to do so. But such people do not have much of a conscience and do not feel bad about violating societal norms. They "do what [they] want to do because [they] want to do it." *Id.*

Following this testimony, on April 2, 2007, the jury was instructed on the punishment special issues and heard closing argument by counsel. The defense reiterated that Petitioner was a "flawed" and "damaged" person who should not be held "to the same level of accountability" as the rest of us. 29 RR 17, 21, 30, 34. During the State's closing, the prosecutor argued that Petitioner's prior violent behavior demonstrates he would present a danger to others in the future and that the evidence presented by the defense regarding Petitioner's childhood and mental health issues did not reduce Petitioner's moral blameworthiness for his actions. After three hours of deliberation, the jury returned its verdict, finding unanimously (1) beyond a reasonable doubt there was a probability Petitioner would commit criminal acts of violence that would constitute a continuing threat to society, and (2) taking into consideration all of the evidence, including the circumstances of the offense, the Petitioner's character, background, and personal moral culpability, there were insufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. 29 RR 62-63. The trial court accordingly sentenced Petitioner to death. *Id.*

C. State Post-Conviction Proceedings

Pursuant to Texas law, Petitioner's state habeas corpus proceedings progressed simultaneously with his automatic direct appeal to the TCCA. *See* Tex. Code Crim. Proc. art. 11.071(4)(a). Accordingly, while his direct appeal was still pending, Petitioner was appointed counsel—attorneys David Shulman and John Jasuta—to represent him in pursuing state habeas corpus relief. No petition for state habeas relief was filed, however, because Petitioner requested to waive his right to any state habeas proceedings and volunteer for execution. At the direction of the trial court, Dr. Kit Harrison examined Petitioner and found him to be mentally competent. The trial court then held a hearing regarding Petitioner's

competency on September 30, 2008. During the hearing, Petitioner reiterated his desire to waive his appeals and the trial court questioned Petitioner in order to determine whether the waiver was knowing and voluntary. At Petitioner's instruction, Shulman and Jasuta did not contest Petitioner's competency. Based upon Petitioner's testimony and the evaluation of Dr. Harrison, the trial court ultimately found Petitioner competent to waive his postconviction rights and entered an order on November 5, 2008, granting his request to waive.

In June 2009—well after his state habeas application would have been due—Petitioner changed his mind and requested that his postconviction rights be reinstated. Shulman and Jasuta later supplemented this request by asking the TCCA to establish a new filing date, arguing that although Petitioner was competent to waive his appeals, he should not have been allowed to due to his inability to make sound, informed decisions. The TCCA disagreed and denied counsels' motion to reinstate the appeal. *Ex parte Tabler*, No. 72,350-01 (Tex. Crim. App. Sept. 16, 2009). Three months later, the TCCA affirmed Petitioner's conviction and sentence on direct appeal in an unpublished opinion. *Tabler v. State*, No. 75,677, 2009 WL 4931882 (Tex. Crim. App. Dec. 16, 2009), *cert. denied,* 562 U.S. 842 (2010). An execution date was then scheduled for May 20, 2010.

D. Federal Post-Conviction Proceedings

On February 12, 2010, Shulman and Jasuta moved in this Court for appointment and for a stay of execution. (ECF Nos. 1, 2). Two weeks later, the Court, Honorable Judge Walter S. Smith, Jr. presiding, granted a stay to allow counsel to exhaust remedies through a petition for writ of certiorari with the United States Supreme Court. (ECF No. 6). But in June 2010, Petitioner sent a handwritten motion to reconsider to the Court indicating his desire for an execution date and claiming his attorneys requested a stay without his permission. (ECF No. 8).

This motion was forwarded to the Supreme Court where his petition for writ of certiorari was pending. (ECF No. 9). A week later, Shulman and Jasuta filed a supplemental pleading with the Supreme Court stating, for the first time, their belief that Petitioner was not competent to waive his appeals. Despite the supplemental pleading, the petition for writ of certiorari was denied on October 4, 2010. *Tabler v. Texas*, 562 U.S. 842 (2010).

Shortly thereafter, Shulman and Jasuta returned to federal district court and requested an inquiry into their client's competency to waive his federal habeas appeals. (ECF No. 11). The Court appointed Dr. Richard Saunders to conduct a mental health evaluation, who, after examining Petitioner, determined Petitioner was mentally competent. (ECF Nos. 12, 22). The Court then held a hearing on August 17, 2011, where it concluded, after hearing Petitioner's testimony, that Petitioner was "not presently suffering from a mental disease, disorder, or defect which prevents him from understanding his legal position and the options available to him or which prevents him from making a rational choice among his options." (ECF No. 30).[4] Notwithstanding this finding of mental competency, the Court also determined that Petitioner's decision to forego his post-conviction remedies may not have been voluntary. This determination was a result of a threatening phone call Petitioner made in October 2008 to a state senator which led to an investigation into cell phone smuggling in prison—an investigation which purportedly resulted in pressure from prison inmates and guards for Petitioner to volunteer for execution. Thus, the Court rejected Petitioner's attempts to waive his appeals and ordered the habeas proceedings to continue. (ECF No. 34).

[4] Shulman appeared to agree, stating at the hearing: "I don't think he's incompetent in a legal sense . . . we were never trying to say he's not competent in a sense to stand trial or be executed but just that his decisions are not voluntary."

On October 3, 2011, Shulman and Jasuta filed a preliminary federal habeas corpus petition and simultaneously requested another stay and abatement to allow them to return to state court for exhaustion purposes. (ECF Nos. 36, 37). A week later, the Court denied a stay and ordered counsel to file a completed federal petition. A full petition was then filed on November 13, 2011, raising a total of fourteen grounds for relief. (ECF No. 39). On February 9, 2012, the Court issued an order denying the federal habeas petition and denying a certificate of appealability ("COA") on all issues. (ECF No. 42). Following the denial of a motion to amend pursuant to Rule 59(e), the Court permitted Shulman and Jasuta to withdraw as counsel and appointed attorney Marcia Widder to represent Petitioner on appeal.

Widder timely filed a notice of appeal and a request for COA with the Fifth Circuit, but on October 3, 2014, the request for COA was denied. *Tabler v. Stephens*, 588 F. App'x 297 (5th Cir. 2014) (unpublished). Shortly after the issuance of new Supreme Court precedent,[5] however, the Fifth Circuit vacated its prior decision and remanded to the district court solely to consider whether Petitioner, "represented by his new counsel Widder or other unconflicted counsel, can establish cause for the procedural default of any ineffective-assistance-of-trial counsel claims pursuant to *Martinez*[6] that he may raise, and, if so, whether those claims merit relief." *Tabler v. Stephens*, 591 F. App'x 281 (5th Cir. 2015); (ECF No. 64). On remand, Judge Smith established a briefing schedule and appointed additional counsel to assist Widder in her representation. (ECF Nos. 66, 72). Petitioner has since submitted approximately 340 pages of briefing on the remand issues supported by over 1,350 pages of exhibits and a disk containing audio and video

[5] *Christeson v. Roper* 135 S. Ct. 891 (2015).

[6] *Martinez v. Ryan*, 566 U.S. 1 (2012).

exhibits. (ECF Nos. 90, 93, 94, 121, 122, 132, 133). In response, Respondent has provided over 250 pages of briefing on the remand issue. (ECF No. 99).

On September 19, 2016, this case was transferred to the undersigned for adjudication. (ECF No. 130). Since that time, the Court has twice considered Petitioner's motions for discovery and to stay and abate the proceedings to allow Petitioner to return to state court, each time rejecting the arguments raised by Petitioner. (ECF Nos. 134, 148). The Court also denied Petitioner's motion for an evidentiary hearing, finding the substantial record and pleadings before the Court to be more than sufficient to determine the issues on remand. (ECF No. 148). This proceeding is thus ripe for adjudication.

II. Collateral Matters Regarding Waiver

Petitioner's history of requesting to waive his appeals and later withdrawing that request is well documented. As discussed previously, Petitioner's state habeas proceedings were dismissed at his request after the trial court found him competent to waive his post-conviction rights. Although Petitioner at one point changed his mind and unsuccessfully attempted to withdraw his waiver, he again sought to waive his post-conviction rights once his federal habeas proceedings began. (ECF No. 8). Following an evaluation by Dr. Saunders and a hearing before Judge Smith, Petitioner was once more found competent to waive his rights, but the Court determined Petitioner's federal habeas proceedings should continue because of the existence of certain forces which prevented Petitioner's waiver from being a voluntary choice at the time. (ECF No. 34). The Court denied Petitioner's initial federal habeas petition in February 2012. (ECF No. 42). Since that time, Petitioner's correspondence with the Court has been prolific, with Petitioner vacillating between a desire to waive further legal effort on his behalf, (ECF Nos.

56, 65, 84, 102, 115, 139, 140, 142, 143-46), and later wanting to continue with the appellate process, (ECF Nos. 67, 114, 141, 147).

Beginning in September 2017, Petitioner began expressing to the Court, both in writing and during a telephonic conference, a consistent desire to waive his right to representation in federal court. (ECF Nos. 150-154, 156, 158, 161-167, 169-170). Without changing his mind, Petitioner repeatedly stated it was his desire to forego all post-conviction remedies and appeals so that an execution date could be set. Because a petitioner unquestionably has a right under *Rees v. Peyton*, 384 U.S. 312 (1966), to waive representation and further appeals if he competently and voluntarily chooses to do so, the Court appointed Dr. Michael Arambula to examine Petitioner to determine whether Petitioner was competent to waive his appeals. (ECF No. 179). The Court also held an evidentiary hearing where it heard expert testimony from four witnesses, including Dr. Arambula, in addition to discussing the matter with Petitioner himself. (ECF No. 205).

Following the evidentiary hearing, Petitioner retracted his waiver and elected to go forward with the appeals process after discussing the matter with counsel and family members. (ECF Nos. 208, 209). As it is Petitioner's unquestionable right to waive representation and further appeals, it is also his absolute right to continue forward with his appeals through the assistance of counsel if he so chooses. Thus, the Court granted Petitioner's request to withdraw his waiver. (ECF No. 213).

III. Analysis

The issues before this Court on remand are twofold: (1) whether Petitioner can establish cause under *Martinez* to excuse the procedural default of any new IATC claims raised by Petitioner and (2) if so, whether those claims warrant relief on the merits. (ECF No. 64). Prior

to *Martinez*, an attorney's negligence in a postconviction proceeding could not serve as "cause" to excuse the procedural default of claims in federal court. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). In *Martinez*, the Supreme Court carved out a "narrow" exception to the *Coleman* rule for IATC claims. *Trevino v. Thaler*, 569 U.S. 413, 422 (2013). Now, a petitioner may meet the cause element by showing (1) that his state habeas counsel were ineffective in an initial-review collateral proceeding,[7] and (2) "that his [IATC claim] is substantial—i.e., has some merit." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013). As discussed below, neither prong is satisfied in this case.

A. The *Strickland* Standard of Review

In the habeas context, allegations of ineffective assistance are reviewed under the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Petitioner must demonstrate (1) counsel's performance was deficient, and (2) this deficiency prejudiced his defense. 466 U.S. at 687-88, 690. This demanding standard applies both in evaluating the potential merit of an underlying IATC claim as well as in evaluating the performance of state habeas counsel. *See Martinez*, 566 U.S. at 14 (suggesting that the *Strickland* standard applies in assessing whether habeas counsel was ineffective). According to the Supreme Court, "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

Strickland's first prong "sets a high bar." *Buck v. Davis*, 137 S. Ct. 759, 775 (2017). "To demonstrate deficient performance, the defendant must show that, in light of the circumstances as they appeared at the time of the conduct, 'counsel's representation fell below an objective

[7] Because Petitioner waived his post-conviction rights, the only state collateral proceeding that occurred was the September 2008 competency hearing. However, the Fifth Circuit has determined that the *Martinez* equitable exception "logically extends" to this proceeding because ineffective state habeas counsel could have prevented an initial-review collateral proceeding from ever taking place. *Tabler v. Stephens*, 591 F. App'x 281.

standard of reasonableness' as measured by 'prevailing professional norms.'" *See Rhoades v. Davis*, 852 F.3d 422, 431-32 (5th Cir. 2017) (quoting *Strickland*, 466 U.S. at 687-88). This requires the Court to "affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003). As such, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Burt v. Titlow*, 571 U.S. 12, 17 (2013) (quoting *Strickland*, 466 U.S. at 690).

To satisfy *Strickland*'s second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In conducting a *Strickland*'s prejudice analysis, a court must "consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). However, the question "is *not* whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (emphasis added) (citing *Wong*, 558 U.S. at 27). Rather, the "likelihood of a different result must be substantial, not just conceivable." *Id.*

B. State Habeas Counsels' Performance

To establish cause under *Martinez*, Petitioner first contends he received ineffective assistance of counsel during his state post-conviction proceedings. The Fifth Circuit summarized the state court proceedings in its original opinion denying Petitioner a COA:

> On April 24, 2007, attorneys David Schulman and John Jasuta were appointed as [Petitioner]'s postconviction counsel. [Petitioner] was provided with separate counsel for his direct appeal, which ran concurrently with his postconviction habeas relief. The State filed its original brief in [Petitioner]'s direct appeal on October 1, 2008. [Petitioner]'s habeas petition was thus required to be filed no later than November 17, 2008. *See* [Tex. Code Crim. Proc.] art. 11.071 § (4)(a) (application for writ of habeas corpus must be filed within 180 days after the convicting court appoints counsel or 45 days after the state's original brief is filed on direct appeal, whichever date is later).
>
> No petition for habeas relief was filed. On May 15, 2008, [Petitioner] informed his attorneys that he wished to waive his postconviction appellate rights. On August 11, 2008, [Petitioner] sent a letter to the Court of Criminal Appeals waiving his right to any state habeas proceedings and volunteering for execution. The Court of Criminal Appeals referred the matter to the state trial court judge who had presided over [Petitioner]'s criminal trial. The state trial court ordered a hearing on [Petitioner]'s competency to waive his appeals and ordered that [Petitioner] undergo examination by Dr. Kit Harrison. Dr. Harrison examined [Petitioner] on June 28, 2008, and found him to be mentally competent. At [Petitioner]'s September 30, 2008 competency hearing, the state trial court considered Dr. Harrison's evaluation; offered [Petitioner], his attorneys, and the State an opportunity to present additional evidence relevant to the competency determination; and questioned [Petitioner] in open court to determine whether his waiver was knowing and voluntary. During this questioning, the judge presented [Petitioner] with the letter he had written to the Court of Criminal Appeals and asked him to explain his request. [Petitioner] replied: "Basically, I'm asking the Court of Appeals to drop all of my appeals after my direct appeal. And should my direct appeal be denied, I'm asking for an execution date as soon as possible." Upon [Petitioner]'s instruction, Schulman and Jasuta did not contest the State's evidence of competency. The state court found [Petitioner] competent to waive his postconviction rights.

Tabler v. Stephens, 588 F. App'x at 299-300.

In that same opinion, the Fifth Circuit rejected the notions that the state court competency hearing violated Petitioner's due process rights or that Schulman and Jasuta were ineffective for failing to challenge his competency. *Id.* at 302-06. Nevertheless, following the Fifth Circuit's

remand to this Court to consider anew whether Petitioner can establish cause under *Martinez*, Petitioner essentially makes the same argument about Schulman and Jasuta that was rejected by the Fifth Circuit—that counsel abandoned their obligation to adequately investigate and challenge Petitioner's competency to waive, resulting in the procedural default of the numerous IATC claims contained in his amended petition. But as the Fifth Circuit found, counsel did not abandon their client as Petitioner now suggests. To the contrary, counsel complied with their client's desire to waive further appeals on his behalf. As the Fifth Circuit noted, "[n]either the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions not to present evidence." *Id.* at 306 (citing *Wood v. Quarterman*, 491 F.3d 196, 203 (5th Cir. 2007)); *see also Autry v. McKaskle*, 727 F.2d 358, 362-63 (5th Cir. 1984) (holding trial counsel ethically obligated to comply with defendant's knowing directive not to present mitigating evidence nor required to seek a competency hearing before complying with that directive).

Citing *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990), Petitioner argues that his attorney's acquiescence to his wishes constitutes ineffective assistance because they were obligated to contest his waiver. But neither *Bouchillon* nor any of the other cases cited by Petitioner from other circuits stand for such a proposition.[8] In *Bouchillon*, counsel was found ineffective for allowing his mentally ill client to plead guilty without having him evaluated or conducting an investigation "of any kind." *Id.* at 596. Unlike counsel in *Bouchillon*, however, Schulman and Jasuta were aware of Petitioner's mental health issues and hired Dr. Harrison to conduct a neuropsychological evaluation of their client after receiving some "bizarre"

[8] Indeed, despite having had the opportunity to do so, the Supreme Court has yet to hold that a competency hearing must be adversarial in nature in order to be full and fair and to afford a prisoner the process he is due. *See, e.g., Hamilton v. Texas*, 497 U.S. 1016 (1990) (misc. order).

correspondence from him regarding his desire to waive his appeals. (ECF No. 90 at 117-119; ECF No. 90-3 at 72-76). Given that Dr. Harrison found Petitioner competent and that counsel agreed with this determination, counsels' decision not to contest Petitioner's decision to waive is imminently reasonable. (ECF No. 90-4 at 8, 25; ECF No. 90-6 at 1-17).

Petitioner also argues counsel were ineffective because they (1) failed to advise him of the correct date his state habeas application was due and (2) failed to investigate and develop claims for relief both before and after his competency hearing. According to Petitioner, he could not have knowingly and voluntarily waived his state habeas appeals without knowing when the application was due or what it would entail. But having reviewed the record and exhibits provided by Petitioner, the Court concludes Petitioner was aware of the relevant filing deadlines[9] and that counsel conducted an extensive investigation in preparation for filing a state habeas petition on Petitioner's behalf. Among other things, the record indicates counsel sought and reviewed records from the trial defense team, including investigators and experts, began a mitigation investigation with the assistance of two mitigation specialists, and sought the assistance of Dr. Harrison, a psychologist, to conduct a neuropsychological examination of Petitioner as part of a mitigation investigation. The voluminous letters and emails to and from counsel submitted by Petitioner also demonstrate counsel did not abdicate their responsibility to Petitioner, but rather were diligently representing their client and were in the process of conducting a thorough investigation into potential claims for relief. As such, Petitioner fails to demonstrate that counsels' performance was deficient.

[9] Even if Petitioner was misled about the deadline for filing a state habeas petition, such an error would be harmless because Petitioner was *waiving his right* to such collateral review. *See Tabler v. Stephens*, 588 F. App'x at 303, fn.5 ("Because he was forfeiting his right to pursue collateral relief, it is irrelevant that the court [or counsel] provided ambiguous information as to the filing deadline.").

Regardless, Petitioner cannot establish he was prejudiced by counsels' failure challenge his competency. Although Petitioner contends counsel were "obligated" to contest Petitioner's waiver because they were aware of his mental health issues, "the presence or absence of mental illness or brain disorder is not dispositive" as to competency. *United States v. Mitchell*, 709 F.3d 436, 440 (5th Cir. 2013) (citing *Mata v. Johnson*, 210 F.3d 324, 329 n.2 (5th Cir. 2000)). Moreover, these issues were already known to Dr. Harrison when he conducted his evaluation and were also known to the trial court because they were presented at length during Petitioner's punishment phase and the same judge that presided over Petitioner's trial presided over his competency hearing. It is therefore unlikely that "the result of the proceeding would have been different" had counsel chosen to oppose Petitioner's waiver. *Strickland*, 466 U.S. at 694. Again, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

Finally, Petitioner was ultimately found to be competent by the trial court after reviewing Dr. Harrison's summary report and interviewing Petitioner in open court regarding his decision. This finding of fact is presumed correct under 28 U.S.C. § 2254(e)(1), and Petitioner has failed to overcome that presumption by clear and convincing evidence. *See also Mays v. Stephens*, 757 F.3d 211, 216 (5th Cir. 2014) (finding no prejudice where there is no evidence of incompetency). It necessarily follows that Petitioner was not prejudiced by counsels' performance, as he cannot establish the results of his proceeding would have been different had counsel contested his competency. As such, Petitioner cannot make the showing of prejudice necessary under *Strickland*'s second prong and thus cannot establish cause under *Martinez* to excuse the procedural default of his new IATC claims.

C. The Underlying IATC Claims

Regardless of whether Petitioner establishes a valid claim of ineffective state habeas counsel under *Martinez*, he still would not be entitled to excuse any procedural bar because the allegations brought forth in his amended petition are meritless. Again, to overcome a default under *Martinez*, a petitioner must also demonstrate that the underlying IATC claim "is a substantial one." *Martinez*, 566 U.S. at 14 (citing *Miller–El v. Cockrell,* 537 U.S. 322 (2003)). "For a claim to be 'substantial,' a petitioner 'must demonstrate that the claim has some merit.'" *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014) (quoting *Martinez*, 566 U.S. at 14). "Conversely, an 'insubstantial' ineffective assistance claim is one that 'does not have any merit' or that is 'wholly without factual support.'" *Id.* (quoting *Martinez*, 566 U.S. at 15-16).

On remand, Petitioner raises IATC claims arguing that trial counsel were constitutionally defective at both the guilt/innocence stage[10] and punishment stage[11] of the trial. Petitioner also argues counsel were ineffective for failing to establish that he was categorically ineligible for the death penalty and that the cumulative prejudicial effect of counsels' errors at both stages of trial denied him the right to effective counsel. Petitioner is unable, however, to overcome the

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[10] Petitioner's first four IATC claims allege that his trial counsel were ineffective prior to or during the guilt/innocence phase of Petitioner's trial for failing to: (1) provide effective representation during voir dire by asking meaningful questions of prospective jurors and objecting to misleading statements by the prosecution and trial court; (2) move to suppress Petitioner's statements to police on the grounds that they were the product of insufficient *Miranda* warnings and coercive police questioning; (3) marshal significant evidence concerning this alleged police coercion; and (4) properly impeach State witness Kimberly Geary.

[11] Concerning the punishment phase of trial, Petitioner alleges that counsel failed to: (1) conduct an adequate investigation into Petitioner's background and mental health; (2) prepare and present appropriate mental health evaluations; (3) adequately prepare their expert witnesses to testify; (4) adequately rebut or mitigate evidence presented by the prosecution; (5) object to the admission of unadjudicated offenses; (6) object to the admission of extraneous victim-impact and victim-character evidence; (7) develop and present evidence regarding the low probability Petitioner would be paroled if sentenced to life imprisonment; and (8) object to an improper closing argument by the prosecution. Petitioner also contends that counsel presented a closing argument that was inflammatory and harmful to his defense.

rigorous burden of proof required under *Strickland* to demonstrate ineffective assistance. As a result, Petitioner fails to establish cause under *Martinez* that would excuse his unexhausted IATC claims from being procedurally defaulted. Alternatively, even if the Court were to look past the procedural default and review the claims *de novo*, relief would be denied because the claims lack merit.

1. Voir Dire (Claim I(A))

Petitioner first alleges that trial counsel provided ineffective assistance during voir dire. Petitioner's allegation is essentially a four-part IATC claim alleging the following: (1) counsel failed to engage in meaningful questioning of potential jurors to determine if they were biased; (2) counsel abdicated their responsibility to ensure the selection of an impartial jury by agreeing to the removal of over forty jurors solely on the basis of their questionnaires;[12] (3) counsel agreed to excuse a prospective juror without attempting to rehabilitate him after the prosecution questioned him; and (4) counsel failed to object when the State and the trial court misstated the law. In response, Respondent argues the above allegations are speculative and that counsels' performance was reasonable and the result of sound trial strategy.

a. Meaningful Questioning

In his first subclaim, Petitioner asserts the voir dire testimony and questionnaire answers from several prospective jurors suggested a bias against Petitioner which rendered the jurors unfit for jury service. Despite this apparent bias, Petitioner contends that his trial counsel failed to ask follow-up questions to determine whether these prospective jurors were competent to

[12] In his briefing, Petitioner also maintains that his appellate counsel was ineffective for not challenging trial counsels' agreement, and the statute which permits such agreements, in a post-sentence motion or on direct appeal. (ECF No. 90 at 152). However, *Martinez* is a "narrow exception" that applies only to claims alleging ineffective assistance by trial counsel. *Martinez*, 566 U.S. at 9-18; *see also Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (declining to extend *Martinez* to claims alleging ineffective assistance of appellate counsel). Because *Martinez* has no effect on the procedural default of any claims concerning appellate counsel, the Court will not address this allegation further.

serve. As a result, three allegedly biased jurors (Karen Lindberg, John Gauntt, and Laticia Rudd) were allowed to serve as jurors while two other jurors (Albert Musgrove and Dale Motl) had to be struck by peremptory challenge instead of for cause.

Petitioner correctly states that "[v]oir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (quotation omitted). But "no hard-and-fast formula dictates the necessary depth or breadth of voir dire." *Skilling v. United States*, 561 U.S. 358, 362 (2010). Because every attorney will likely conduct voir dire in a different manner, the mere fact that another attorney might have asked different questions will not support a finding of ineffective assistance. *See Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) ("Moreover, Garza cites no authority, and we have found none, that would require a defense attorney to ask specific questions at voir dire."). Rather, a defense attorney's method of voir dire is strategic and entitled to substantial deference, and thus "cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness." *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (quotation omitted).

In the context of determining whether the failure to strike an allegedly partial juror constitutes deficient performance, a court must first evaluate whether the juror at issue was actually biased. *Virgil v. Dretke*, 446 F.3d 598, 608-10 (5th Cir. 2006). The bias determination centers on a juror's own indication that he/she has "such fixed opinions that he could not judge impartially respondent's guilt." *Patton v. Yount*, 467 U.S. 1025, 1035 (1984); *Virgil*, 446 F.3d at 607 (holding that "the Supreme Court's treatment of the right to an impartial jury is more than a mere backdrop to our analysis; it is the lens through which we must examine counsel's

performance in this case.") (citation omitted). In other words, this Court must determine "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

Based on the above criteria, the Court's review will center on whether one of the jurors cited by Petitioner was biased and, if so, whether additional questioning by counsel would have made the juror subject to removal by cause. *See Villanueva v. Stephens*, 555 F. App'x 300, 306 (5th Cir. 2014) (unpublished) (to establish deficient performance, a petitioner "must identify any particular juror who was in fact prejudiced and must establish that had counsel's questioning focused on a specific area of bias, the bias would have been found.").

(i) Karen Lindberg

Petitioner states counsel accepted Lindberg without having a "meaningful understanding" of Lindberg's views on the death penalty, citing to a portion of voir dire where Lindberg states her belief that the death penalty would be inappropriate for someone who killed to protect another person, such as a kid. 18 RR 27. Petitioner contends Lindberg "had no idea what a conviction for capital murder entailed" and faults counsel for not clarifying whether Lindberg would automatically impose the death penalty in a case where the jury already found the defendant guilty and considered him to be a continuing threat to society. (ECF No. 90 at 161-62).

Aside from whether Lindberg's statement warranted further clarification from counsel, the record demonstrates she did not have "such fixed opinions that [she] could not judge impartially respondent's guilt." *Patton*, 467 U.S. at 1035. Quite the opposite, Lindberg repeatedly stated during cross-examination by counsel that she would consider all of the

evidence before deciding whether the death penalty was appropriate. 18 RR 29 ("You've got to look one day at a time, one piece of evidence at a time and put it all together"), 32 ("You have to look at all the circumstances"), 35 ("You have to look at everything"), 37 (stating that punishment is "not an algebra formula" and you have to "look at everything" to make a decision). Under a hypothetical proposed by counsel where she was serving on a jury with another juror who believed "if you kill, you should be killed," Lindberg stated she would respond by explaining that "[y]ou can't just look at a picture . . . you've got to listen to what's going on in the back." *Id.* at 37-38.

There is nothing in the record to indicate Lindberg was a biased juror or that her views would "prevent or substantially impair the performance of [her] duties as a juror." *Witt*, 469 U.S. at 424. Petitioner's emphasis on one answer both mischaracterizes Lindberg's ability to be impartial and misrepresents counsels' efforts to ensure her qualifications as a juror.

(ii) John Gauntt

Petitioner contends Gauntt, an attorney, was never asked a single question to elicit his opinions about the death penalty. He undermines this assertion by citing several instances where Gauntt agrees with the prosecution that the death penalty should be a "last resort" reserved for the "worst criminals." 19 RR 72, 74-75. Acknowledging these statements, Petitioner faults counsel for not asking follow-up questions to ascertain further whether Gauntt "could fairly consider a life sentence in [Petitioner]'s case." (ECF No. 90 at 163).

It is Petitioner's burden to establish that Gauntt was biased and could not act as an impartial juror in his case. *Virgil*, 446 F.3d at 608-10. Petitioner does not meet this burden. Instead, he accuses counsel of ineffective representation based on speculation that further questioning may have uncovered something more about Gauntt's views on the death penalty.

Such speculative assertions do not constitute a meritorious IATC claim. *See Garza*, 738 F.3d at 675-76 (rejecting as speculative Garza's allegation that trial counsel were ineffective for failing to ask what jurors would do in a hypothetical case similar to Garza's). Moreover, the record indicates Gauntt believed the death penalty to be a "last resort," and that he would answer the special issues based on all the evidence presented. 19 RR 75-76, 83. Gauntt agreed that each juror must decide what they consider to be mitigating and concluded by stating he has no problem "following an oath that I've done [] all my life." *Id.* at 82-84. Nothing in Gauntt's answers indicated bias or required any further questioning from counsel.

(iii) Laticia Rudd

Citing Rudd's juror questionnaire and voir dire testimony indicating her belief that the death penalty is appropriate in heinous cases where the defendant intentionally killed and showed no remorse for his/her actions, Petitioner contends counsel were ineffective for failing to ascertain whether Rudd could consider a life sentence in such circumstances. Petitioner appears to ignore the part of the record where counsel did make such an inquiry. 15 RR 155-60. Aside from whether the cited questionnaire and voir dire response could have led to more in-depth questioning by counsel, however, Petitioner fails to demonstrate Rudd was actually biased or "had such fixed opinions that [she] could not judge impartially respondent's guilt." *Patton*, 467 U.S. at 1035.

Rudd's voir dire examination indicated she would keep "an open mind," consider all of the evidence, and could return either a life or death sentence depending on the evidence. 15 RR 139-73. Although she believed the death penalty was meant for those who committed heinous crimes "without remorse," Rudd did not believe everyone who committed capital murder and was found to be a future danger should automatically receive a death sentence. Instead, she

indicated a willingness to listen to all of the evidence presented before making a determination, including a defendant's life history and mental health, and would not require a defendant to take the stand in order to show remorse. In short, Rudd's testimony demonstrated she was not a juror whose views would "prevent or substantially impair the performance of [her] duties as a juror." *Witt*, 469 U.S. at 424.

Petitioner also faults counsel for failing to ascertain whether Rudd would be biased as a result of pending criminal charges against her husband for spousal abuse. In her juror questionnaire and again under examination by the prosecution, Rudd admitted there was a pending charge against her husband but stated her belief that the charges would be dropped in February 2007, before Petitioner's trial. (ECF No. 93 at 58); 15 RR 141. Petitioner contends this testimony is false because the charges were not actually dropped until May 2007, well after Petitioner's trial, a situation that jeopardized Rudd's ability to remain impartial given the need "to curry favor with the State as a means to ensure that the charges against her husband were eventually dropped." (ECF No. 90 at 166). But not only is this interpretation of the record incorrect—Rudd only stated her belief the charges would be dropped, not when they would actually be dropped—Petitioner's contention that Rudd "needed to curry favor" with the State in order to ensure the charges were dropped is speculation.

Regardless, Petitioner's selective reading of the record does not establish Rudd's bias against Petitioner. In fact, it could establish the opposite. Rudd was apparently the victim of assault by her husband but chose to speak with the prosecutors about dropping the charges. Rudd agreed with defense counsel that she was "making a judgment call about [her husband's] background, about his character and about . . . the probability for the future" when she did so. 15 RR 158. This is in line with Rudd's other testimony establishing she could be a sympathetic

juror and would consider all the evidence about a defendant's background and character before making a determination on punishment. Thus, Petitioner has not shown that counsel needed to ask Rudd any additional questions regarding her husband's case. *See United States v. Fisher*, 480 F. App'x 781, 782 (5th Cir. 2012) (unpublished) (finding counsel was not ineffective in failing to question or challenge a potential juror because there was no credible evidence that the juror was biased).

(iv) Albert Musgrove and Dale Motl

Prospective jurors Albert Musgrove and Dale Motl did not serve on Petitioner's jury, but rather were peremptorily struck by counsel following the end of voir dire. Petitioner contends counsel struck the jurors without adequately determining whether they were excusable for cause, which would have saved the defense a peremptory challenge.[13] Similar to the previous jurors, Petitioner fails to demonstrate Musgrove and Motl "had such fixed opinions that [they] could not judge impartially respondent's guilt." *Patton*, 467 U.S. at 1035. Both prospective jurors' testimony generally indicated an ability to consider the evidence and follow the law when making a determination on a defendant's guilt and potential punishment, and neither displayed a bias that would "prevent or substantially impair" their performance as jurors if chosen. 13 RR 199-230; 15 RR 116-34.

In any event, simply because counsel were forced to use a peremptory strike does not indicate they were ineffective. "So long as the jury that sits is impartial, the fact that [the petitioner] had to use a peremptory challenge to achieve that result does not mean that the Sixth Amendment was violated." *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Petitioner failed to

[13] Counsel did attempt to challenge Musgrove for cause after questioning him, but the trial court determined there was not "sufficient reason at this point to grant a challenge for cause." 15 RR 133. Petitioner contends counsel should have continued to question Musgrove to ascertain whether he could be struck for cause.

demonstrate an impartial juror sat on his jury, much less that one was imposed upon him because counsel were forced to use their remaining peremptory strikes on prospective jurors challengeable for cause. As such, Petitioner was not prejudiced by counsels' refusal to question the jurors further. *Id.* at 89 (holding the failure to remove a challengeable juror for cause "is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."); *see also Soria v. Johnson*, 207 F.3d 232, 241-42 (5th Cir. 2000) ("[B]ecause [the venire member] did not sit on [the petitioner's] jury, [the petitioner] is precluded from making a substantial showing of the denial of a federal right with respect to this claim.").

b. Potential Jurors Excused By Agreement

Under Texas Code of Criminal Procedure Article 35.05, a prospective juror "may by consent of both parties be excused from attendance by the court at any time before he is impaneled." Petitioner states that the parties in this case agreed to dismiss over forty prospective jurors without ever questioning them to assess their demeanor and the credibility of their jury questionnaire answers. According to Petitioner, counsels' decision "abdicated their responsibility to ensure the selection of a fair and impartial jury" because several of the jurors (Petitioner names four) were not challengeable for cause based on the answers they gave to the jury questionnaire. (ECF No. 90 at 175).

Counsels' actions during voir dire "are considered to be a matter of trial strategy." *Teague*, 60 F.3d at 1172. As stated previously, "[a] decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be 'so ill chosen that it permeates the entire trial with obvious unfairness.'" *Id.*; *see also United States v. Mullins*, 315 F.3d 449, 453 (5th Cir. 2002) (reiterating that a court must be "highly deferential

to counsel's trial strategy" in determining whether counsel's performance was deficient). Here, the record is silent as to why the agreed-upon jurors were struck by the parties, and Petitioner does not allege that the excusals were based on race or any other impermissible factor. Nor does Petitioner establish that the removed jurors were favorable to the defense or would have served on Petitioner's jury had they not been excused. Instead, Petitioner takes issue with counsels' agreement based solely on his subjective belief that the jurors were not yet removable for cause because they had not been questioned. Yet, there is no authority requiring all potential jurors to be questioned, and Texas law allows excusal by the consent of parties. Because counsels' decision to remove the jurors by agreement falls within an area traditionally reserved for strategic decision, Petitioner's argument fails. *Teague*, 60 F.3d at 1172.

c. Prospective Juror Wayne Bickham

Petitioner next contends that counsel were ineffective by agreeing to excuse prospective juror Wayne Bickham without asking Bickham a single question. During examination by the prosecutor, Bickham got hung up on questioning concerning his views on life imprisonment and whether a defendant would be subject to parole in forty years:

> Q: No. You're not even worried about [parole]. And—
>
> A: How—how—no. No. I have to be. How can I make the decision for the life option without considering that? I can't do that.
>
> Q: Because you're not. All you're doing is answering these questions. The judge is going to instruct you you can't consider how parole would be applied in this case.
>
> A: Then I'm not a candidate for your jury.
>
> Q: You just couldn't keep from considering that, right?
>
> A: I don't see how I could.

16 RR 132. Counsel chose not to attempt to rehabilitate Bickham and agreed to excuse him from the jury. *Id*. at 134.

Petitioner fails to overcome the presumption that counsels' excusal of Bickham was sound trial strategy. *Strickland*, 466 U.S. at 689; *Teague*, 60 F.3d at 1172. Counsel had an obvious reason to excuse Bickham—his inability to keep from considering the possibility of parole when assessing punishment—and counsel were under no obligation to question Bickham further in order to rehabilitate him. Because counsels' decision to remove Bickham by agreement falls within an area traditionally reserved for strategic decision, and this strategy was clearly reasonable, Petitioner fails to demonstrate that counsel were ineffective. *Teague*, 60 F.3d at 1172; *see also Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009) (reiterating that "a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under then prevailing professional norms").

d. Alleged Misstatements of Law

Finally, Petitioner contends counsel were ineffective for failing to object to misstatements of the law made by the prosecution and the trial court. Specifically, Petitioner argues the following: (1) the prosecution repeatedly told prospective jurors that all twelve chosen jurors had to agree that mitigating circumstances existed before a life sentence was warranted, rather than just ten as required by Texas law; (2) the prosecution repeatedly promoted standardless decision-making by telling the jurors it was up to them to determine the meaning of the special issues; (3) the prosecution told jurors that mitigation must have a "nexus" to the crime; and (4) both the prosecution and the trial court informed numerous jurors during voir dire that a life sentence in this case meant a forty-year sentence.

Once again, counsels' actions during voir dire "are considered to be a matter of trial strategy" that do not constitute ineffective assistance unless they are "so ill chosen that it permeates the entire trial with obvious unfairness." *Teague*, 60 F.3d at 1172. Petitioner does not make this showing, as it does not appear that any of the cited instances demonstrate that either the prosecution or trial court misstated the law to the jury in any meaningful way. Because counsel are not required to make futile objections, review of Petitioner's claim could end there. *Miller v. Thaler*, 714 F.3d 897, 904 n.6 (5th Cir. 2013).

Nevertheless, even if the record demonstrated that the prosecution or trial court misstated the law, a great deal of time had passed between voir dire and the jury's deliberation at the punishment phase. The jury had heard significant evidence and argument at both phases of trial, making it unlikely they remembered the complained-of statements. The Court is therefore "skeptical that, by the time their . . . deliberations began, the jurors would have remembered the explanations given during voir dire, much less taken them as a binding statement of the law." *Penry v. Johnson*, 532 U.S. 782, 801 (2001).

Moreover, the trial court correctly instructed jurors before their deliberations on how to consider the evidence in answering the special issues. *See* CR 270-77. "A jury is presumed to follow its instructions." *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012) (citing *Weeks v. Angelone*, 528 U.S. 225, 234 (2000)). As such, the jury charge ameliorated any harm from the prosecution's alleged misstatements during voir dire because jurors were given a full ability to give effect to Petitioner's evidence under the mitigation special issue. *See Styron v. Johnson*, 262 F.3d 438, 454 (5th Cir. 2001) (finding that, despite prosecutor's misstatement of the law during voir dire, there was no constitutional error because the court properly instructed the jury in accordance with law).

Given the significant amount of time, evidence, and testimony that the jury had to consider after hearing the prosecutor's statements, and in light of the correct jury instructions, "[t]he comments of . . . counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations on . . . [Petitioner's] sentence." *Penry*, 532 U.S. at 802. Thus, this portion of Petitioner's first allegation fails to establish either prong of the *Strickland* analysis.

e. Summary

Petitioner's multifaceted allegation fails to demonstrate that an impartial juror sat on his jury or that counsels' strategy during voir dire was anything but reasonable. Rather, Petitioner's allegations reveal that trial counsel did not conduct voir dire in a manner that Petitioner's present counsel, in hindsight, would have conducted voir dire. But "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (citing *Bell v. Cone*, 535 U.S. 685, 702 (2002)). Petitioner has not shown that trial counsel provided deficient performance, or that actual prejudice resulted, from counsels' performance during voir dire. Consequently, the Court concludes that Petitioner's first claim lacks merit and, because the claim is "insubstantial," that the procedural-bar exception in *Martinez* is unavailable. *See Martinez*, 566 U.S. at 14.

2. Petitioner's Statements (Claims I(B) and I(C))

On the night he was arrested, Petitioner gave several statements to police before finally confessing to the murders. During a pretrial hearing on a motion to suppress, counsel unsuccessfully argued the statements should not be admitted since they were the product of an unlawful, warrantless arrest. Petitioner now argues counsel were ineffective for not attempting

to suppress the statements on the grounds they were obtained without sufficient *Miranda*[14] warnings and were the product of coercive police questioning. In a somewhat redundant allegation, Petitioner also claims counsel were ineffective for failing to marshal evidence suggesting the statements were coerced. Petitioner's allegations do not meet either prong of the *Strickland* analysis.

a. Background

The TCCA summarized the facts surrounding Petitioner's statements in its opinion on direct appeal:

> Killeen Police Officer Robert Clemons and Bell County Sheriff's Department Investigator Timothy Steglich testified at the pre-trial suppression hearing. Clemons testified that toward the beginning of November, [Petitioner] had begun "working off" a pending theft case stemming from his purchase of stereo equipment with fraudulent checks. [Petitioner] signed a contract in which he agreed to cooperate as a confidential informant in a drug investigation in exchange for nonprosecution of the theft.[15] An investigator in the Bell County District Attorney's Office introduced [Petitioner] to Clemons. [Petitioner] worked with Clemons on a controlled drug buy on November 4, 2004.
>
> In the course of investigating the murders of Rahmouni and Zayed, the Bell County Sheriff's Department identified [Petitioner] as a "person of interest." Around 4:00 p.m. on November 28, 2004, which was the Sunday following Thanksgiving, Steglich, who was leading the murder investigation, contacted Clemons and asked him to speak with [Petitioner] about setting up a controlled drug buy. Both Steglich and Clemons understood that the drug buy was just a ruse. They wanted [Petitioner] to set up the buy and then go to the police station to meet Clemons so that they could arrest him on his pending theft case and then question him about the murders. Both officers were aware that no arrest warrant had been issued. Steglich had begun working with the district attorney's office on this matter some time before he contacted Clemons. However, he did not obtain an arrest warrant until about 10:55 p.m. that evening.
>
> Clemons left a voice-mail message with [Petitioner] around 4:30 p.m., and [Petitioner] returned his call around 7:00 p.m. [Petitioner] agreed to set up the drug buy and meet Clemons at the police station. He set up the buy and called

[14] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[15] The precise terms of this contract are not in the record.

Clemons to say that "Chris" would not be able to obtain the drugs until after 9:00 p.m. [Petitioner] arrived at the police station around 9:15 p.m., and Clemons went through the motions of preparing for the buy. Steglich called in with updates about his progress in obtaining the arrest warrant. In turn, the police officers informed Steglich that [Petitioner] was becoming anxious to leave and make the drug buy. At about 9:25 p.m., Steglich instructed Clemons to arrest [Petitioner], despite the fact that Steglich had not yet obtained a warrant.[16]

Clemons testified that [Petitioner] was enthusiastic about helping with the drug buy. Clemons did not view [Petitioner]'s anxiety to leave the police station as a desire to flee; rather, he believed that [Petitioner] was anxious to complete the drug buy because it was getting late and his seller would be waiting for him as scheduled. Clemons initially handcuffed [Petitioner] incident to frisking and "wiring" him in preparation for the drug buy, and Clemons kept [Petitioner] handcuffed after he received instructions to arrest him. Clemons acknowledged that he did not *Mirandize* [Petitioner] in connection with his arrest until around 10:05 p.m. *See Miranda v. Arizona* []. As soon as [Petitioner] was informed he was under arrest for theft, he spontaneously volunteered that he had information about the murders. [Petitioner] indicated that his friend "Tim" had committed the murders and then told him all the details. He said he wanted to talk to someone in the district attorney's office. Clemons testified that [Petitioner] was still focused on getting his theft case dropped. Clemons did not interrogate [Petitioner] at that time, but [Petitioner] kept talking.

Steglich testified that he believed that [Petitioner] would flee if Clemons let him leave the police station to complete the drug buy. However, Steglich also testified that he had the impression that [Petitioner] was anxious to leave because he wanted to complete the drug buy, not because he wanted to escape. Even without direct evidence that [Petitioner] intended to escape, Steglich believed that [Petitioner] was "an extreme flight risk" based on his knowledge that [Petitioner] had arrests from several states, had moved frequently between states shortly before arriving in Killeen, was not steadily employed, had given two addresses in Killeen as his residence, and "other matters, including a warrant outstanding out of Florida that [Steglich] was unable to confirm." Therefore, when Steglich heard that [Petitioner] was becoming anxious to leave, he instructed Clemons to arrest him. Steglich did not begin questioning [Petitioner] until after he had obtained the magistrate's signature on the arrest warrant and [Petitioner] had been transported to the county jail.

After they had the arrest warrant, both Steglich and Clemons interrogated [Petitioner]. Clemons testified that, when they began the interrogation, he recorded it with a digital audio recorder, but the recorder's memory ran out before the first statement was completed and none of the remaining interrogation was

[16] Clemons testified that Steglich told him the warrant had been obtained before he arrested [Petitioner], but he also testified that Steglich told him to arrest [Petitioner] without a warrant because he was a flight risk. This inconsistency does not affect [the state court's] resolution of this claim.

> recorded. In [Petitioner]'s first written statement, he stood by his original story that Tim had committed the murders and then told [Petitioner] about them. This statement was taken at 12:20 a.m. on November 29. Steglich did not believe that [Petitioner] had told them everything because he was being evasive, fidgeting, failing to make eye contact, and focused on leaving the building. Therefore, they interrogated [Petitioner] further. Steglich acknowledged that by then he was pressing [Petitioner] for information. [Petitioner] took bathroom breaks and drank coffee throughout the interrogation.
>
> After additional questioning, [Petitioner] gave a second written statement which, unlike the first statement, included initialed *Miranda* warnings and a signed waiver. In it, [Petitioner] admitted that he was present while Tim committed the murders, and he gave consent to search his rooms at two residences as well as the car he had driven to the police department. This statement was taken at 2:20 a.m.
>
> Still not satisfied that [Petitioner] had told them the whole story, Steglich and Clemons continued to question [Petitioner]. Steglich acknowledged that by then, he was moving in front of [Petitioner], demanding eye contact, and asking [Petitioner] if he had ever lost a family member. [Petitioner] became very emotional. Steglich had the impression that [Petitioner] realized he had lost control of the interview and was wearing down. However, [Petitioner] never said that he did not want to talk, that he wanted a lawyer, or that he wanted to take a break and get some sleep.
>
> [Petitioner] then gave a third written statement, which included *Miranda* warnings and a waiver. In it, [Petitioner] said, "I was pushed into a corner by these people and I will now tell the truth about these incidents." He then described how he had planned and executed the murder of Rahmouni, how he had intentionally murdered Zayed, and how he had taken a wallet and a black bag from Zayed's car after the murders. This statement was taken at 5:13 a.m.

Tabler v. State, 2009 WL 4931882, at *5-6.

b. Counsel Was Not Deficient

Prior to trial, counsel filed a motion to suppress the statements because they were the product of an illegal arrest and because the statements "were not the result of a knowing or voluntary waiver of federal and state warnings." 1 CR 96. At the pre-trial hearing on the motion, however, counsel essentially limited their argument to asserting that the warrantless arrest was illegal and that the confessions were therefore inadmissible as "fruit of the poisonous tree." 21 RR 77. Petitioner contends that counsels' failure to argue other meritorious grounds

for suppression—i.e., insufficient *Miranda* warnings and coercive police conduct—constitutes ineffective assistance. According to Petitioner, the strength of counsels' chosen argument for suppression was "immaterial to whether counsel should have raised valid, alternative bases for suppression of the statements." (ECF No. 132 at 42). The Court disagrees.

Trial counsel have broad discretion when it comes to deciding how best to proceed strategically. *See Ward v. Stephens*, 777 F.3d 250, 264 (5th Cir. 2015) (indicating counsel has "wide latitude in deciding how best to represent a client") (citing *Yarborough*, 540 U.S. at 5-6, 8). Even when counsel focuses on certain arguments to the exclusion of others, "there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 8; *Trottie v. Stephens*, 720 F.3d 231, 243 (5th Cir. 2011) (holding the failure to present a particular line of argument is presumed to be the result of strategic choice). Counsels' choice of a defense and his strategy in arguing that defense to a jury are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. Indeed, a "conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill-chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d at 752-53.

Following the extensive testimony of Officer Clemons and Investigator Steglich at the pre-trial hearing, counsel attempted to suppress the statements based on the fact that they were the product of a warrantless, and thus illegal, arrest. This strategy was neither ill-chosen nor objectively unreasonable, as the evidence demonstrating Petitioner was a flight risk (the only applicable exception to the warrant requirement) was, at best, unconvincing. *See* Texas Code of Criminal Procedure Article 14.04 (stating an offender's imminent escape to be an exception to the warrant requirement). Although the argument was rejected by the trial court, the TCCA held

on direct appeal that Petitioner's warrantless arrest was illegal before concluding the statements were admissible because they were "sufficiently attenuated from the illegal arrest." *Tabler v. State*, 2009 WL 4931882, at *4-12. Thus, counsels' strategy, while ultimately unsuccessful, was reasonable under the circumstances.

Petitioner does not appear to dispute the merits of counsels' chosen argument. Instead, he faults counsel for pursuing an "all or nothing" approach and not raising other meritorious arguments for suppression. But "[t]he law does not require counsel to raise every available nonfrivolous defense." *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009). Again, there is a strong presumption that counsels' focus on certain arguments to the exclusion of others is a strategic choice rather than neglect. *Yarborough*, 540 U.S. at 8. Given the wide latitude afforded to counsel in deciding how best to represent their client, Petitioner fails to demonstrate counsels' chosen strategy to suppress his statements constitutes deficient performance under *Strickland*.

c. No Prejudice

Even assuming counsel was deficient for arguing only one theory in support of suppressing the statements, the results of the proceedings would not be different because Petitioner's alternative arguments—that the statements were obtained without sufficient *Miranda* warnings and were the product of coercive police questioning—are without merit. *See Richter*, 562 U.S. at 111-12 (stating the "likelihood of a different result must be substantial, not just conceivable.").

Petitioner first contends that his initial statements to Officer Clemons at the Killeen Police Department after he was arrested were obtained in violation of his Fifth Amendment rights. According to Petitioner, he was interrogated about the murders for over forty-five

minutes before he was advised of his *Miranda* rights. The Supreme Court has stated that *Miranda* warnings are required when (1) a suspect is in custody and (2) is subjected to interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980). There is no doubt Petitioner was "in custody" for *Miranda* purposes following his arrest for theft. However, the record contradicts Petitioner's assertion that he was interrogated on the murder charge, indicating instead that Petitioner spontaneously volunteered information about the murders to Officer Clemons immediately after being informed he was under arrest for theft. *See Tabler v. State*, 2009 WL 4931882, at *5 (indicating Petitioner volunteered information and that Officer Clemons did not interrogate Petitioner at the time). Because Petitioner's pre-*Miranda* statements were voluntary and not the result of a custodial interrogation, Petitioner was not prejudiced by trial counsels' failure to challenge their admissibility on these grounds. *See Miranda*, 440 U.S. at 478 (holding that "[v]olunteered statements of any kind are not barred by the Fifth Amendment[.]"); *Miller*, 714 F.3d at 904 n.6 (counsel is not required to make futile motions or objections).

Next, Petitioner contends the *Miranda* warnings he was eventually given were insufficient to protect his rights because he had already been questioned by Officer Clemons. In support of his claim, he relies upon *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, the police diluted the effect of *Miranda* warnings through a two-step strategy: a detective "exhaustively questioned" the suspect until securing a confession and then, after a brief break, delivered the *Miranda* warnings and had the suspect repeat the earlier confession. *See Bobby v. Dixon*, 565 U.S. 23, 30 (2011) (citing *Seibert*, 542 U.S. at 604–606, 616). By finding the post-warning confession inadmissible, the *Seibert* Court addressed a specific concern: "the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession." 542 U.S.

at 609; s*ee also United States v. Montalvo–Rangel*, 437 F. App'x 316, 319 (5th Cir. 2011) (stating that *Seibert* condemned a "question first" police tactic, "a strategy by which officials interrogate an individual without administering a *Miranda* warning, obtain an admission, administer a *Miranda* warning, and then obtain the same admission again").

Petitioner's reliance on *Seibert* is misplaced. While police exhaustively questioned Seibert until she confessed to murder prior to giving her *Miranda* warnings, Petitioner was neither interrogated about the murder nor did he offer any incriminating information prior to being *Mirandized*. To the contrary, after being arrested for theft, Petitioner spontaneously volunteered that it was Tim Payne who committed the murders and then told the details to Petitioner, a story Petitioner maintained in his first written statement. Petitioner did not confess to the murders until his third written statement, well after being *Mirandized* on three different occasions. Because Petitioner has not shown that his constitutional rights were violated by the same "question first, warn later" procedure condemned in *Seibert*, he has also not demonstrated that counsel were ineffective for raising such a challenge at the suppression hearing.

Finally, Petitioner contends counsel had valid grounds to suppress each of the statements because they were all the product of police coercion. Specifically, Petitioner contends: (1) Officer Clemons and Investigator Steglich employed tactics designed to overbear his will, including interrogating him for over six hours, refusing to accept any statement that he was not the shooter, standing a foot in front of him and physically intimidating him, and wearing him down until he admitted guilt; (2) Officer Clemons and Investigator Steglich induced his statements by telling him he would be released if he gave information about the murders; (3) he has a history of mental health disorders and confessing to crimes he did not commit; and (4) counsel had ample opportunity to challenge the credibility of the officers at the suppression

hearing. Taking all these factors into consideration, Petitioner argues, his statements were involuntary and thus inadmissible.

An individual may waive his right against self-incrimination, if done so "voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444. Two relevant inquiries determine whether an accused has voluntarily and knowingly waived his Fifth Amendment privilege against self-incrimination. First, the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Berghuis v. Thompkins*, 560 U.S. 370, 382-83 (2010) (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Second, the waiver or relinquishment must be made with full awareness of the nature of the right being waived. *Id*. In making these inquiries, the court must consider the "totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

The record in this case demonstrates that the factors mentioned by Petitioner did not impede his ability to make a knowing, intelligent, and voluntary waiver of his rights. While Detective Steglich admitted he pressured Petitioner to be more forthcoming and, at one point, stood about a foot away, such tactics do not constitute coercive or oppressive behavior that would render a confession involuntary. Petitioner's interrogation at the Bell County Sheriff's Office lasted only five hours, during which Petitioner was given refreshments and bathroom breaks. Both Steglich and Clemons denied that Petitioner was threatened, coerced, or promised anything in exchange for his confession during this time. Petitioner was informed of his *Miranda* rights on three separate occasions, appeared to understand them, and signed a waiver of these rights when he gave his second and third statements. At no time did he give any indication that he did not understand those rights or that he wanted to stop the questioning. In sum,

Petitioner's verbal and written confirmation that he understood his *Miranda* rights, along with his willingness to be interviewed, establish that he made a knowing, intelligent, and voluntary waiver of his *Miranda* rights.

Petitioner suggests his statements were involuntary because of a long history of mental health disorders and confessing to crimes he did not commit. Although mental state or condition may be a significant factor in the voluntariness determination, "this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'" *Carter v. Johnson*, 131 F.3d 452, 462 (5th Cir. 1997) (citing *Colorado v. Connelly*, 479 U.S. 157, 164 (1986)). In *Connelly*, the Supreme Court explained that the sole concern of the Fifth Amendment and *Miranda* is government coercion, and not the "moral and psychological pressures to confess emanating from sources other than official coercion." 479 U.S. at 169 (citing *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). Thus, the Court determined that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id*. at 164.

Assuming for the moment that Petitioner was mentally unstable at the time of his confession, he still fails to identify any impropriety or undue influence by the police that would have rendered his confession involuntary. Indeed, the record is bereft of any persuasive evidence that Petitioner's confessions were not "the product of a free and deliberate choice" but rather the result of overly coercive police tactics. *Berghuis*, 560 U.S. at 382-83. As a result, the Court concludes that Petitioner's allegations are "insubstantial" and do not warrant the application of the *Martinez* exception to the procedural default doctrine. *Martinez*, 566 U.S. at 14.

3. Impeachment of Kimberly Geary (Claim I(D))

Petitioner next contends counsel were ineffective for failing to impeach the guilt/innocence and punishment phase testimony of State's witness Kimberly Geary. At guilt/innocence, Geary testified that she met Petitioner at a nightclub about a week before the murders of Mohamed–Amine Rahmouni and Haitham Zayed and brought Petitioner home with her. 23 RR 155-82. Although it was only meant to be a one night stand, Petitioner essentially moved into the home uninvited and stayed there with Geary and several of her roommates, including Tim Payne. On the night of the murders, Petitioner and Payne returned home early in the morning, entered Geary's bedroom, and awakened her. Petitioner told Geary "that he had just killed two guys," then showed her a videotape of the murders. Geary then testified as follows:

> I saw in the back of the white Eclipse, and I saw the passenger door open and I saw [Petitioner] grab the passenger from the car and throw him on the ground. I saw the passenger put his arm up, showing that he was still alive. And then I saw [Petitioner] about maybe two feet away from him, shoot him right in the head, saying "who has the power now."

23 RR 165. Petitioner destroyed the videotape the next day and threatened to kill everybody in the house if Geary told anyone.

The State recalled Geary to testify at the punishment phase regarding her knowledge of the murders of Amanda Benefield and Tiffany Dotson. 26 RR 137-55. According to Geary, Petitioner boasted that he killed Benefield and Dotson because "they were going around saying that he was the one who killed [Rahmouni and Zayed] . . . and he had to take care of them." *Id.* at 141. Petitioner seemed "proud" of the murders and explained to her how he did it:

> He said he shot the driver first, which was Tiffany. And then [Amanda] was next—next to her friend and then he said he shot her a few times in the head. And then he made sure Tiffany was dead by touching her and shot her again.

Id. at 142. Geary believed Petitioner because she had seen the videotape of his previous murders. *Id.*

Petitioner argues counsel were ineffective at both stages of trial for failing to adequately challenge Geary's credibility. According to Petitioner, effective counsel would have cross-examined Geary on the following issues: (1) her drug use and whether she was under the influence of heroin, alcohol, and Zoloft during the relevant time periods; (2) her alleged bias in favor of Tim Payne; and (3) her motive to testify favorably for the State, given she "was facing significant criminal liability at the time she provided information to police." (ECF No. 132 at 49). Had counsel confronted Geary about these issues, Petitioner asserts, they could have argued at closing that Geary was not worthy of belief. Petitioner's allegation does not meet either prong of the *Strickland* analysis.

To support his allegation concerning Geary's alleged drug use and bias toward Tim Payne, Petitioner states that effective counsel would have "interviewed witnesses" and investigated a statement given to police by John Yarbrough, a man incarcerated with Tim Payne shortly after Payne was arrested for the instant murders.[17] Petitioner fails, however, to provide a single witness, including Yarbrough, who was available to testify regarding Geary's alleged drug use and bias. Complaints of uncalled witnesses are not favored on federal habeas review because allegations of what a witness would have testified to are largely speculative. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). To prevail on such an IATC claim, a petitioner must name the witness, demonstrate the witness was available to testify, delineate the content of the witness's proposed testimony, and show the testimony would have been favorable to the defense. *Id.* at 538. Because Petitioner fails to name a witness who was available and willing to testify

[17] In his statement, Yarbrough contends he befriended Payne while playing cards together and that Payne told him, among other things, that he had a sexual relationship with Geary and that she had used heroin one night while they were together. (ECF No. 90-7 at 99).

about Geary, his allegations about her alleged drug use, bias, and motive are tantamount to sheer speculation and do not warrant relief.

Even if Yarbrough had indicated a willingness to testify on Petitioner's behalf, his testimony—based on the contents of his statement to police—would have been far more damaging than helpful to Petitioner's case. Yarbrough's statement to police essentially corroborated Petitioner's confession and the State's case against him: Petitioner lured Rahmouni with the promise to sell him stereo equipment and then shot both Rahmouni and "the guy that was with him;" Payne videotaped Petitioner shooting Rahmouni in the head and later showed the video to Geary before destroying it; Petitioner had a mental list of different people who needed to be killed; Petitioner and Payne lured Benefield and Dotson out to the lake with the promise of drugs where Petitioner shot them several times; and Geary "knew every detail of the murders." (ECF No. 90-7 at 96-101). Thus, counsels' failure to call Yarbrough as a witness, even if he could establish Geary's drug use or bias, does not constitute deficient performance, nor was Petitioner prejudiced as a result.

Regardless, a thorough review of the record indicates counsel provided effective cross-examination on several issues, including Geary's credibility as a witness. At the guilt/innocence phase, Geary testified that, on the night Rahmouni and Zayed were murdered, there was a party at her house where alcohol and drugs were consumed. 23 RR 162. Geary stated she had been drinking but did not do any drugs. *Id.* On cross-examination, counsel questioned Geary extensively on her activities that night and established that she had been drinking on the night of the murders, that she usually drank alcohol every day, and that she did not take drugs that night because she was taking Zoloft for her anxiety. *Id.* at 175-78. Although she denied it, counsel repeatedly asked Geary if she had consumed drugs that evening. *Id.* at 176-80.

The record further indicates that any assertion Geary was biased toward Tim Payne is, at best, speculative. On direct examination, Geary established that Payne was with Petitioner when he showed her the videotape of the murder, that Payne was the one who did the recording, and that Payne was covered in a lot of blood. *Id.* at 164-67. On cross-examination, counsel established Payne "had a whole lot more blood" on him than Petitioner when they returned to Geary's house. *Id.* at 182. It is thus unclear how Geary's testimony can now be seen, in hindsight, as favoring Payne over Petitioner given that her testimony implicated both Petitioner and Payne in a capital murder. As such, counsel was not ineffective for failing to raise the issue.

Similarly, counsel was not ineffective for failing to suggest Geary had a motive for testifying favorably for the State due to the fact she had not reported the above activities to the police and that police recovered narcotics and the murder weapon from her home. Although Petitioner implies Geary was under investigation for these events, he provides no evidence to support this implication. Such a conclusory allegation does little, if anything, to establish that counsel performed deficiently. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) (holding "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding"); *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990) (same). Consequently, Petitioner fails to establish that counsels' cross-examination of Geary was deficient or that results of the proceeding would have been different had counsel conducted the cross-examination differently. *Strickland*, 466 U.S. at 694. Petitioner's allegation is therefore insubstantial and does not warrant habeas relief.

4. Investigation and Preparation (Claims II(A) and II(B))

Petitioner's next two claims for relief allege that trial counsel were ineffective for failing to investigate and present mitigating evidence to the jury at the punishment phase of trial. In Claim II(A), Petitioner contends counsel failed to conduct an adequate investigation of his

background and mental health that would have uncovered congenital birth defects and provided firsthand accounts of his chaotic childhood. Had they done so, Petitioner attests, counsel could have presented testimony from "brothers, friends, boyfriends, girlfriends, teachers, administrators, and others" regarding Petitioner's upbringing and called experts in Klinefelter's Syndrome (KS), Fetal Alcohol Spectrum Disorder (FASD), neuropsychology, and psychiatry to explain his multiple mental health disorders. (ECF No. 90 at 224). Because counsels' investigation was limited to only a "narrow set of sources," Petitioner contends the jury received "a misleadingly sanitized picture of his background." *Id.* at 216, 222.

Petitioner expounds on this allegation in Claim II(C), arguing counsel consulted and called other mental health experts to testify without providing them with the results of an adequate mitigation investigation. As a result, the experts were left to "fish in the dark" for Petitioner's history, and important medical disorders (KS, FASD) and mental health disorders (borderline personality, bipolar) either went undetected or were underdeveloped. *Id.* at 224. Neither of Petitioner's allegations is substantial pursuant to *Strickland* and *Martinez*.

a. Applicable Law

Under *Strickland*'s familiar two-prong test, Petitioner must demonstrate counsels' performance was deficient and this deficiency prejudiced his defense. 466 U.S. at 687-88, 690. In preparing for the penalty phase of a death penalty trial, "counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary." *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). Counsel must, at minimum, interview potential witnesses and make an independent investigation of the facts and circumstances of the case. *Kately v. Cain*, 704 F.3d 356, 361 (5th Cir. 2013). But counsel generally need not go "looking for a needle in a haystack," especially when they have "reason to

doubt there is any needle there." *Maryland v. Kulbicki*, 136 S. Ct. 2, 4-5 (2015) (per curiam) (quoting *Rompilla v. Beard*, 545 U.S. 374, 389 (2005)). Instead, counsels' decision not to investigate a particular matter "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). When the omission alleged is failing to investigate something in particular, a court must look at "the known evidence" and whether it "would lead a reasonable attorney to investigate further." *Id.* at 527.

In reviewing such claims, it is also important to remember that counsels' performance need not be optimal to be reasonable. *Richter*, 562 U.S. at 104; *Yarborough*, 540 U.S. at 8 (per curiam) (finding a defendant is entitled to "reasonable competence, not perfect advocacy."). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Richter*, 562 U.S. at 110. For this reason, every effort must be made to eliminate the "distorting effects of hindsight," and there is a strong presumption that an alleged deficiency "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

b. Counsels' Performance Was Not Deficient

Contrary to Petitioner's assertion, there is no evidence suggesting trial counsel conducted a less than a reasonable investigation into Petitioner's background and mental health. Counsel were assisted in their investigation at various points by a fact investigator (Bob Harrell) and two mitigation specialists (Pamela Stites and Gerald Byington). The record makes clear that the defense team obtained and reviewed a significant amount of records[18] as part of their

[18] These records include, but are not limited to, records from the Psychiatric Medical Group, the Lee Memorial Health System, the Emanuel Medical Center, the Doctors Medical Center, the Stanislaus

investigation, and conducted interviews, either by phone or in person, with Petitioner and Petitioner's mother, father, and sister. Counsel also obtained the services of three experts who testified at trial: Dr. Meyer Proler (clinical neurophysiology), Dr. Susan Stone (psychiatry), and Dr. Deborah Jacobvitz (psychology).[19] In addition, counsel consulted to an uncertain degree with at least four experts who did not testify at trial: Craig Schweitzer (associate of Dr. Proler), Dr. William Lee Carter (psychology), Dr. Steve Mark (psychiatry), and Dr. Brock Morris (psychiatry).

As a result of their investigation, counsel presented a substantial mitigating case during the punishment phase of Petitioner's trial, including the following: (1) testimony from Petitioner's mother and sister about his difficult childhood, potential birth trauma, problems in school, mental instability, and history of psychiatric issues; (2) testimony from Dr. Proler concerning an abnormality of the left temporal frontal region of Petitioner's brain that causes difficulty in planning, relating to others, and weighing the consequences of one's actions; (3) testimony from Dr. Stone that Petitioner was neglected and abandoned as a child, had a history of head injuries, suffered from a severe case of ADHD, and was diagnosed with bipolar disorder and borderline personality disorder, all of which inhibited his ability to rationally assess situations and control his impulses; and (4) testimony from Dr. Jacobvitz regarding Petitioner's history of parental neglect and abandonment that could have resulted in behavioral or emotional

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Behavioral Health Center, the Ruth Cooper Behavioral Health Center, the Adventist Medical Center, Turlock Family Services, the Atascadero State Mental Hospital, the Corcoran State Hospital, and the Oregon Health and Science University. They also include California Department of Corrections records, Lee County Sheriff's Department records, Bell County records, Michigan court documents, school records, and letters from Petitioner's father, Robert Tabler. (ECF No. 90-1 at 68-88; ECF No. 90-12 at 6, 38-42).

[19] Both Dr. Stone and Dr. Jacobvitz reviewed volumes of Petitioner's medical, school, and criminal records, and Dr. Jacobvitz interviewed Petitioner and his family.

problems, a lack of conscience, or an inability to empathize with other people. *See* Background, Section II(B), *supra*. All of this evidence supported counsels' stated intention to demonstrate Petitioner had never been "normal" and was therefore undeserving of a death sentence.

Petitioner does not contend this strategy was deficient; rather, he argues counsel were deficient in implementing it by conducting an unreasonably limited investigation into Petitioner's neglected and chaotic upbringing. According to Petitioner, there were dozens of other witnesses who could have testified about Petitioner's upbringing and his "impaired ability to negotiate the world and cope with its challenges." As mentioned previously, however, complaints of uncalled witnesses are disfavored as means of establishing an IATC claim, in part because allegations of what a witness would have testified are largely speculative. *Day v. Quarterman*, 566 F.3d at 538. To prevail on an IATC claim based on counsels' failure to call a witness (either a lay witness or an expert witness), the petitioner must name the witness, demonstrate the witness was available to testify, delineate the content of the witness's proposed testimony, and show the testimony would have been favorable to the defense. *Gregory v. Thaler,* 601 F.3d 347, 352 (5th Cir. 2010); *Day*, 566 F.3d at 538.

Petitioner fails to do so. Instead, he offers only the social history report compiled by his current mitigation specialist, Colleen Francis. (ECF No. 90-5 at 31-76). In her report, Ms. Francis summarizes into a single narrative various hearsay statements allegedly made by approximately sixty individuals she interviewed regarding Petitioner's family, childhood, development, education, drug and alcohol use, mental health, and head injuries. However, neither Ms. Francis nor Petitioner's current counsel provide a single affidavit from one of these witnesses, much less delineate in any meaningful way the content of each source's proposed testimony or whether those sources were available and willing to testify at trial. As a result,

Petitioner's allegations concerning the multitude of individuals counsel could have called to testify is tantamount to sheer speculation and does not establish that counsels' performance was deficient in any way.

Petitioner attempts to get around this dilemma by arguing that a more thorough investigation could have informed counsels' mental health presentation by leading to the discovery of important medical disorders such as KS and FASD, and by providing corroboration for Petitioner's mental disorders, including his borderline personality and bipolar disorder. To support this argument, Petitioner does provide affidavits from several experts concerning their respective diagnoses. *See, e.g.,* ECF No. 90-6 at 30-74 (affidavit of Dr. Natalie Brown stating that certain red flags existed at the time of Petitioner's trial which indicated a strong possibility of FASD); 90-7 at 18-21 (affidavit of Professor Carole Samango-Sprouse indicating Petitioner was recently diagnosed with KS); 36-56 (affidavit of Dr. Julian Davies confirming the diagnoses of FASD and KS in Petitioner). But again, none of these experts indicate that they were available and willing to testify to the contents of their affidavits at Petitioner's trial. *See Day*, 566 F.3d at 538 (applying the uncalled-witness requirements to both lay and expert witnesses).

Even if the experts were available and willing to testify in this case, this Court rejects Petitioner's implication that trial counsel were obligated to hire additional experts to find previously undiagnosed medical disorders (such as KS and FASD) or to corroborate Petitioner's other diagnosed mental health disorders. *Strickland* does not require counsel to "canvass[] the field to find a more favorable defense expert." *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000). To the contrary, counsel were entitled to rely on the opinions of their own mental health experts in deciding what defensive theories to pursue. *See Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) ("Counsel should be permitted to rely upon the objectively reasonable

evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment . . .") (quoting *Smith v. Cockrell*, 311 F.3d 661, 676-77 (5th Cir. 2002), *overruled in part on other grounds*, *Tennard v. Dretke*, 542 U.S. 274 (2004)); *see also Turner v. Epps*, 412 F. App'x 696, 704 (5th Cir. 2011) (unpublished) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel should be able to rely on that expert to alert counsel to additional needed information . . .").

The record makes clear that Petitioner's trial counsel obtained the services of a mitigation specialist, fact investigator, and three mental-health experts. These experts conducted multiple interviews with Petitioner and his family, reviewed voluminous school and medical records, conducted EEG testing, and performed a psychological evaluation of Petitioner. None of the experts retained by trial counsel indicated that they were missing information needed for an accurate diagnosis. Although Petitioner speculates that his medical disorders might have been discovered had counsel conducted an adequate investigation and provided the experts with an accurate social history, such a statement is doubtful given that none of the numerous school and health care professionals who have evaluated Petitioner over the years have ever diagnosed Petitioner with these conditions or even suggested further testing was necessary. Because there was no "objective indication" that further investigation was necessary or even desirable, counsel will not be labeled deficient for failing to pursue this avenue of mitigation. *See Richter*, 562 U.S. at 107 (although "hypothetical experts" might be useful, counsel is entitled to "formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."); *see also Earp v. Cullen*, 623 F.3d 1065, 1076-77 (9th Cir. 2010) (finding that an expert's "failure to diagnose a mental condition does not constitute ineffective

assistance of *counsel*, and [Petitioner] has no constitutional guarantee of effective assistance of experts") (emphasis in original).

c. Petitioner Was Not Prejudiced

Even assuming counsel were deficient in not investigating further, Petitioner fails to demonstrate prejudice under the second prong of *Strickland*. For mitigation-investigation claims such as these, a federal habeas court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Trevino v. Davis*, 861 F.3d 545, 549 (5th Cir. 2017) (citing *Wiggins*, 539 U.S. at 534). *Strickland* does not require the State to "rule out" or negate a sentence of life in prison to prevail; rather, it places the burden on the defendant to show a "reasonable probability" that, but for counsels' deficient investigation, the result of the punishment phase of a trial would have been different. *Wong v. Belmontes*, 558 U.S. at 27 (citing *Strickland*, 466 U.S. at 694). "The likelihood of a different result must be substantial, not just conceivable." *Brown v. Thaler*, 684 F. 3d 482, 491 (5th Cir. 2012) (citing *Richter*, 562 U.S. at 112). Petitioner has not made this showing.

Petitioner faults counsel for not uncovering certain details concerning his chaotic childhood and developmental problems that is now contained in Colleen Francis's social history report. But much of what is contained in Ms. Francis's report is not new—rather, it is of the same genre as that presented to the jury at trial. For instance, evidence that Petitioner (1) was often unsupervised and cared for mainly by his older sister; (2) had an abusive and neglectful mother; and (3) exhibited inappropriate social reactions, erratic behavior, suicidal ideation, and classic symptoms of ADHD during his childhood all were presented at length by Petitioner's mother and sister, as well as through the expert testimony of both Dr. Stone and Dr. Jacobvitz. *See* Background, Section II(B), *supra*. Petitioner's difficulty in school and developmental

impairment, including evidence that Petitioner may have suffered from brain damage at an early age, was also discussed extensively by defense witnesses, including Dr. Proler, Dr. Stone, and his sister. *Id.* While Ms. Francis's report undoubtedly provides more details, any additional testimony regarding Petitioner's chaotic childhood and developmental issues would have been cumulative of evidence already presented at trial. *See Skinner v. Quarterman*, 528 F.3d 336, 345 n. 11 (5th Cir. 2008) (finding any IATC claim must falter "where the evidence to be discovered is so similar and cumulative that failure to find and present it would not prejudice the result") (citation omitted).

Similarly, Petitioner contends counsel should have secured appropriate medical evaluations during their investigation which would have led to, among other things, discovering that Petitioner was born with KS and FASD. Citing the report of Professor Samango-Sprouse, an expert in KS, Petitioner states that multiple behavioral manifestations and central nervous dysfunctions occur in individuals with KS, including decreased impulse control, heightened anxiety, mood lability, low frustration tolerance, depression, and executive functioning impairment. (ECF No. 90 at 96). Persons suffering from FASD display certain similar characteristics, including an inability to complete tasks or control impulses, severe attention deficits, learning disabilities, complex mental health problems, and poor social skills. *Id.* at 99-106. Because they did not consult with experts in these fields, Petitioner argues, counsel (and therefore the jury) were left with an inaccurate and incomplete explanation for why Petitioner was unable to "regulate his conduct, control his emotions, relate to others normally, pay attention, or succeed in school." *Id.* at 233.

Although no evidence was presented that Petitioner was born with KS or FASD, the jury was not left without an explanation for Petitioner's inability to control his behavior. Dr. Proler

testified Petitioner likely suffered from brain damage which impaired his ability to predict, plan, and to comprehend the meaning of words and their emotional content. *See* Background, Section II(B), *supra*. Dr. Stone corroborated this testimony and added that the damage was to the part of Petitioner's brain that normally regulates a person's ability to control impulses and react appropriately. *Id*. Dr. Stone also testified that Petitioner's severe ADHD, bipolar disorder, and borderline personality disorder caused his mood swings and impaired his ability to control his impulses and rationally assess circumstances. *Id*. She concluded by stating that the combination of these issues "resulted in a real inability for [Petitioner] to rationally assess situations and to use good judgment, to abstract from his mistakes and to control his impulses." *Id*. Thus, any testimony to that effect—whether from an expert in KS and FASD, or some other mental health professional—would have been largely redundant. "[A]ny ineffective assistance claim must falter where the evidence to be discovered is so similar and cumulative that failure to find and present it would not prejudice the result." *Trottie*, 720 F.3d at 246-47 (citing *Skinner*, 528 F.3d at 345 n. 11).

Regardless, when the "totality of available mitigating evidence" is weighed against the aggravating evidence presented at trial, it is clear Petitioner was not prejudiced from any alleged deficiencies in counsels' investigation. *Trevino*, 861 F.3d at 549; *see also Strickland*, 466 U.S. at 698 (finding no prejudice due to State's overwhelming evidence on aggravating factors supporting the death penalty). Indeed, in cases such as this where "the evidence of [ ] future dangerousness was overwhelming . . . it is virtually impossible to establish prejudice." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (citing *Strickland*, 466 U.S. 698); *see also Busby v. Davis*, 925 F.3d 699, 726 (5th Cir. 2019) (stating that though mitigation evidence may not have been presented "as effectively as it might have been," a petitioner could not show prejudice when

the jury heard evidence regarding an unstable childhood and the "State's case on punishment was strong") (citing *Parr v. Quarterman*, 472 F.3d 245, 258 (5th Cir. 2006)).

As detailed in the background section of this opinion, Petitioner confessed to the premeditated murders of Mohamed–Amine Rahmouni and Haitham Zayed over a previous conflict Petitioner had with Rahmouni. Petitioner lured the two men to an isolated area with the promise to sell Rahmouni some cheap stereo equipment then shot both victims at close range.[20] A few days later, Petitioner did the same thing to Amanda Benefield and Tiffany Dotson for allegedly spreading word of Petitioner's crime. Petitioner admitted to luring Benefield and Dotson to a lake with the promise of drugs before shooting them both multiple times with the same gun used to murder Rahmouni and Zayed. Petitioner bragged about the murders to his friend and showed her a video of the first murders. He also taunted police about the killings and threatened to murder the rest of the Teazers' employees if police did not close the club.

In addition, the jury heard extensive evidence concerning Petitioner's history of threatening law enforcement officers and their families. Among other examples, Petitioner threatened a parole officer and his family after Petitioner was arrested for a parole violation, and threatened the family of a Michigan police officer if the officer did not stop investigating him for an alleged home invasion. The jury also heard the testimony of Dr. Richard Coons, a forensic psychiatrist who diagnosed Petitioner as having antisocial personality disorder (ASPD). According to Dr. Coons, Petitioner displayed almost all of the traits associated with ASPD,

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[20] While, by their nature, all capital murder cases involve terrible circumstances, Supreme Court precedent plainly anticipates that the severity of the crime is a relevant factor in *Strickland* prejudice. *See Smith v. Spisak*, 558 U.S. 139, 154-55 (2010); *Strickland*, 466 U.S. at 699; *see also Vasquez v. Thaler*, 389 F. App'x 419, 428 (5th Cir. 2010) (unpublished) ("Naturally, the power of the newly amplified case to mitigate a jury's selected punishment will be contingent on other factors in the case, such as the circumstances of the crime."); *Carty v. Thaler*, 583 F.3d 244, 263 (5th Cir. 2009) ("In this re-weighing, the brutality of the crime is relevant but does not automatically trump additional mitigating evidence.").

including a pervasive pattern of disregard for the rights or feelings of others at an early age, deceit, manipulation, impulsivity, and indifference to the consequences of his actions. Dr. Coons explained that people with ASPD used to be termed psychopaths, do not have much of a conscience, and "do what [they] want to do because [they] want to do it," not because they lack free will.

Given the strength of the overwhelming evidence establishing Petitioner's future dangerousness, Petitioner fails to establish the result would have been different had counsel discovered the evidence in question. *See Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989) (finding no ineffective assistance "[g]iven the weakness of such testimony when juxtaposed with the overwhelming evidence of guilt, the horrifying nature of the crime, and the abundant impeachment material available to the State"). Petitioner was therefore not prejudiced by counsels' allegedly deficient mitigation investigation.

d. Summary

Petitioner contends that counsel "deficiently implemented their own strategy" of showing that he was "not normal" by conducting an unreasonably limited investigation into his upbringing and congenital birth defects. But "[t]he defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources." *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992). Although it is tempting, in hindsight, to observe that counsel could have investigated more, hired different experts, or presented more mitigating witnesses, this Court is "particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less

susceptible to judicial second-guessing." *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir. 2009) (quoting *Dowthitt*, 230 F.3d at 743) (internal quotation marks omitted)).

In this case, the objective evidence present in the record demonstrates counsel conducted a broad investigation into Petitioner's background and mental health and presented a thorough case for mitigation. Petitioner provides little persuasive evidence to the contrary, and the evidence he has presented is, for the most part, cumulative of the evidence already adduced at trial. Moreover, Petitioner's evidence does not come close to outweighing the substantial evidence presented by the State regarding Petitioner's responsibility for four murders and history of threatening law enforcement officers and their families. *See Busby*, 925 F.3d at 726 (finding evidence "of the same genre as that presented to the jury at trial" could not outweigh the State's "overwhelming" evidence of future dangerousness) (citing *Newbury v. Stephens*, 756 F.3d 850, 873-74 (5th Cir. 2014)). Consequently, Petitioner fails to demonstrate either deficient performance or prejudice as required under *Strickland*, rendering Petitioner's allegations insubstantial and without merit.

5. Preparation of Expert Witnesses (Claim II(C))

In his next allegation, Petitioner contends that counsels' deficiencies regarding their handling of expert witnesses was not limited to failing to provide them with the results of an adequate social history investigation. According to Petitioner, counsel also failed to adequately prepare the experts to testify with the records that were in counsels' possession, failed to object to irrelevant and prejudicial cross-examination, and failed to rehabilitate the witnesses with available evidence following the State's cross-examination. Similar to the previous allegation, Petitioner's argument is based on exactly the type of second-guessing and hindsight that

Strickland prohibits. 466 U.S. at 689-90 (finding "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence").

The questioning of witnesses and the presentation of evidence are inherently matters of trial strategy when such choices are the result of a "conscious and informed decision on trial tactics." *Cotton*, 343 F.3d at 752. Because decisions regarding the questioning and cross-examination of witnesses are strategic, they usually "will not support an ineffective assistance claim." *United States v. Bernard*, 762 F.3d 467, 472 (5th Cir. 2014) (citation omitted). To establish deficient performance, Petitioner must not only rebut the presumption that counsels' decisions were based on sound trial strategy; he must also show that counsels' performance fell below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. But counsel will not be judged ineffective only by hindsight. *Yarborough*, 540 U.S. at 6 ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); *Rompilla*, 545 U.S. at 374 ("hindsight is discounted").

Here, Petitioner has been unable to resist the temptation to second-guess trial counsel with the benefit of hindsight. Petitioner cites several examples during the testimony of Dr. Proler, Dr. Stone, and Dr. Jacobvitz where counsel seemingly could have done more to help bolster the credibility of the expert in the eyes of the jury following cross-examination by the State. For example, counsel could have had Dr. Proler explain the differences between an "objective" EEG and a "quantitative" EEG and why his analysis was based solely on the former, and could have supported Dr. Stone's testimony about Petitioner's family life and various diagnoses (ADHD, bipolar disorder, borderline personality disorder) with records to that effect.

While additional questioning arguably could have been helpful, the record indicates it was not necessary given the substantial mitigating evidence counsel already elicited from each

expert during direct examination. As discussed previously in this opinion, the jury heard a considerable amount of evidence from defense experts explaining Petitioner's inability to control his behavior, including the fact that Petitioner was neglected and abandoned as a child, likely suffered from brain damage, and was diagnosed with severe ADHD, bipolar disorder, and borderline personality disorder, all of which impaired his ability to control his impulses, rationally assess circumstances, and empathize with other people. In other words, counsels' handling of the defense experts was reasonable and was not required to reach the level of "perfect advocacy." *Yarborough*, 540 U.S. at 6; *see also Castillo v. Stephens*, 640 F. App'x 283, 292 (5th Cir. 2016) (unpublished) ("[s]peculating about the effect of tinkering with the cross-examination questions is exactly the sort of hindsight that *Strickland* warns against").

In any event, even assuming counsels' performance could be considered deficient for their handling of the experts' testimony, Petitioner fails to demonstrate that the results of the proceeding would have been different had counsel prepared and rehabilitated their experts in the manner Petitioner now suggests. *Strickland*, 466 U.S. at 694. As discussed in the previous section, the State established Petitioner was responsible for four premeditated murders, bragged about the murders and taunted authorities afterward, and has a history of threatening law enforcement officers and their families. In situations such as this, where evidence of future dangerousness is overwhelming, it is difficult to establish *Strickland* prejudice. *Ladd*, 311 F.3d at 360. There is therefore no merit to Petitioner's assertion that the results of the punishment phase would have been different had counsel prepared and rehabilitated their experts differently.

In short, Petitioner fails to demonstrate that counsel were deficient or that the results of the punishment phase would have been different had counsel prepared and rehabilitated their

experts as he now suggests. Petitioner's allegation is therefore insubstantial and does not warrant federal habeas relief.

6. Rebuttal of State's Evidence (Claim II(D))

Petitioner next contends trial counsel were ineffective for failing to rebut or otherwise mitigate evidence presented by the State at the punishment phase. Specifically, Petitioner focuses on the testimony of Officer Jeff Hilliker, a Michigan police officer who briefly testified about his investigation of a home burglary that took place in July 2004 where two handguns were stolen from the home. 25 RR 39-52. During the course of his investigation, Officer Hilliker spoke with two of Petitioner's acquaintances, Scott Nash and Lisa Wagner, who advised him that they had traveled to California with Petitioner that summer in a stolen truck and had seen Petitioner in possession of similar handguns. After obtaining Petitioner's cell phone number, Officer Hilliker contacted Petitioner who initially denied knowledge of the handguns. Petitioner later called back several times and threatened the officer and his family if he did not immediately drop the investigation.

Petitioner argues his trial counsel were ineffective because they did not require Officer Hilliker to link the guns seen in Petitioner's possession to the ones taken in the burglary. According to Petitioner, Nash and Wagner had no personal knowledge of the origin of the guns seen in Petitioner's possession, thus reasonable counsel would have objected to this testimony because "there was no foundation establish[ing] that these were the same guns stolen in a burglary." (ECF No. 90 at 241). The problem with this argument is that Officer Hilliker never explicitly stated that the weapons seen by Nash and Wagner were the same as those stolen in the burglary he was investigating. Moreover, the point of Officer Hilliker's testimony was that Petitioner threatened to harm him and his family if he continued to investigate the burglary.

Thus, the impact of an objection by counsel regarding the guns would have been negligible. *Roberts v. Thaler*, 681 F.3d 597, 612 (5th Cir. 2012) ("the failure to lodge futile objections does not qualify as ineffective assistance") (quoting *Koch v. Puckett*, 907 F.2d at 527).

Petitioner also argues counsel were ineffective for failing to interview Lisa Wagner and present her testimony about her relationship with Petitioner as mitigating evidence. Again, to prevail on an IATC claim based on counsels' failure to call a witness, a petitioner must name the witness, demonstrate the witness was available to testify, delineate the content of the witness's proposed testimony, and show the testimony would have been favorable to the defense. *Day*, 566 F.3d at 538. Unsupported claims regarding an uncalled expert witness "are speculative and disfavored by this Court as grounds for demonstrating ineffective assistance of counsel." *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002).

According to a social history report compiled by Petitioner's current mitigation specialist Colleen Francis, Wagner stated that she cared deeply for Petitioner but ended their relationship because Petitioner was unstable, suffered from severe mood swings, and did not understand the consequences of his actions. (ECF No. 90-5 at 466). While arguably favorable, Petitioner fails to establish Wagner was available to testify or that her testimony would resemble what Colleen Francis wrote in her report. Although Petitioner contends Wagner "would have testified on his behalf at sentencing and asked the jury to spare his life" had she been contacted by trial counsel (ECF No. 90 at 219-20), he provides no affidavit from Wagner—only Colleen Francis's hearsay report, which, contrary to Petitioner's reassurances, lacks any indication that Wagner was available and willing to testify. Thus, Petitioner's speculative and misleading allegation fails to establish that counsel were deficient. *See Sayre v. Anderson*, 238 F.3d 631, 636 (5th Cir. 2001) (explaining that "[w]here the only evidence of a missing witnesses' testimony is from the

defendant, this Court views claims of ineffective assistance with great caution") (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986)).

Finally, even assuming counsels' performance could be considered deficient for the above reasons, Petitioner fails to demonstrate that the results of the proceeding would have been different had counsel acted differently. *Strickland*, 466 U.S. at 694. With regard to presenting Lisa Wagner as a witness, Petitioner cannot demonstrate prejudice because her proposed testimony—that Petitioner was kind and caring but also severely unstable—would largely reiterate the testimony of several other witnesses presented by counsel. *See Trottie*, 720 F.3d at 246-47 (finding IATC claim for failing to call a witness fails if the proposed testimony was cumulative of evidence already in the record); *Skinner*, 528 F.3d at 345 n. 11 (same).

Similarly, the results of Petitioner's punishment phase would not have been different had counsel objected to Officer's Hilliker's failure to establish a link between the stolen handguns and the handguns seen in Petitioner's possession because that was not the point of Hilliker's brief testimony. Rather, Hilliker's testimony established (1) that Petitioner was being investigated for a home burglary and (2) Petitioner threatened the lives of the investigating officer and his family if he did not cease the investigation, both of which the jury would have heard regardless of whether counsel successfully objected on these grounds. Moreover, Hilliker's testimony lasted a total of thirteen pages and was only a small part of the State's overwhelming evidence of Petitioner's future dangerousness. As discussed previously in this opinion, the State established that Petitioner was responsible for four premeditated murders, bragged about the murders and taunted the authorities afterward, and had a history of threatening law enforcement officers and their families. *See* Section C(4)(c), *supra*. In situations such as

this, where evidence of future dangerousness is overwhelming, it is virtually impossible to establish *Strickland* prejudice. *Ladd*, 311 F.3d at 360.

In summary, Petitioner fails to demonstrate that counsel were deficient or that the results of the punishment phase would have been different had counsel filed the above objection or presented Lisa Wagner as a witness. Petitioner's allegations are therefore insubstantial and do not warrant federal habeas relief.

7. Unadjudicated Offenses (Claim II(E))

At the punishment phase of Petitioner's trial, the State presented testimony from several witnesses concerning numerous prior criminal acts committed by Petitioner which he had not been convicted of to demonstrate Petitioner was a future danger to society. This included testimony concerning the murders of Amanda Benefield and Tiffany Dotson, Petitioner's attempt to escape custody after being arrested for a parole violation, Petitioner's potential involvement in a home invasion, and Petitioner's threats to law enforcement officials. In Claim II(E), Petitioner claims trial counsel were ineffective for failing to object to the admission of these "unsubstantiated and unadjudicated" offenses because their admission violated his Eighth and Fourteenth Amendment rights. Petitioner also faults counsel for not objecting to inadmissible hearsay regarding these criminal acts.[21] Both of these allegations lack merit.

To start, Petitioner's allegation concerning unadjudicated offenses fails because he has provided no legal authority to support his assertions. Conclusory assertions of deficient performance by trial counsel such as those contained in Petitioner's amended petition are

[21] Petitioner also maintains that his appellate counsel was ineffective for not raising these issues, and others, on direct appeal. (ECF No. 90 at 222, 225). As stated previously in this opinion, *Martinez* is a "narrow exception" that applies only to claims alleging ineffective assistance by trial counsel. *Martinez*, 566 U.S. at 9-18; *see also Davila v. Davis*, 137 S. Ct. at 2065 (declining to extend *Martinez* to claims alleging ineffective assistance of appellate counsel). Because *Martinez* has no effect on the procedural default of any claims concerning appellate counsel, the Court will not address these allegations further.

insufficient to support a claim for ineffective assistance of counsel. *Woodfox v. Cain*, 609 F.3d 774, 809 n.17 (5th Cir. 2010); *Gregory*, 601 F.3d at 353. Perhaps the reason for this lack of supporting authority is that the law is clear on this issue: the "admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments." *Brown v. Dretke*, 419 F.3d 365, 376 (5th Cir. 2005) (quoting *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987); *Hughes v. Dretke*, 412 F.3d 582, 593 (5th Cir. 2005) ("[T]he Supreme Court has never held that the federal constitution requires a state to prove an extraneous offense beyond a reasonable doubt."); *Harris v. Johnson*, 81 F.3d 535, 541 (5th Cir. 1996) (holding that "the use of evidence of unadjudicated extraneous offenses, at the sentencing phase of Texas capital murder trials, does not implicate constitutional concerns"). Even "[t]he introduction of evidence of extraneous offenses of which the defendant has been acquitted is consistent with due process." *Harris*, 313 F.3d at 246.

Furthermore, even though there is no constitutional prohibition on the introduction of evidence at the punishment phase showing that the defendant has engaged in unadjudicated criminal conduct, Petitioner's jury was instructed it could only consider evidence of Petitioner's extraneous offenses if it found beyond a reasonable doubt that he committed the offenses:

> You are instructed that there is evidence before you in this case regarding the Defendant having committed or participated in other acts or transactions other than the offense alleged against him in the indictment in this case, that you cannot consider such other acts or transactions, if any, unless you first find and believe beyond a reasonable doubt that the defendant committed or participated in such acts or transactions, if any, but if you do not so believe, or if you have reasonable doubt thereof, you will not consider such evidence for any purpose.

1 CR 270. Petitioner's trial counsel cannot reasonably be faulted for failing to object to admissible testimony, particularly in light of the fact that the jury received the above instruction. *See Miller v. Thaler*, 714 F.3d at 904 n.6 (counsel is not required to make futile motions or objections); *Roberts*, 681 F.3d at 612 ("the failure to lodge futile objections does not qualify as

ineffective assistance") (quoting *Koch*, 907 F.2d at 527). Petitioner's claim is therefore meritless.

Petitioner also claims that trial counsel should have objected to several incidences of hearsay concerning his unadjudicated offenses. The first was during testimony from Petitioner's former parole officer Peter Lev who, in addition to testifying about Petitioner's attempt to escape after being arrested for a parole violation, stated he was taken off of Petitioner's case because Petitioner told a social worker that he was going to "take care" of the parole agent and his family when he got out of jail. 25 RR 24-30. The other incidents of alleged hearsay occurred during the testimony of Officer Hilliker, a Michigan police officer who testified that he was threatened by Petitioner for investigating a home invasion. *Id*. at 39-43. According to Petitioner, it was hearsay for Officer Hilliker to state (1) that the homeowner had advised him that guns were missing from the home, and (2) he learned from two other individuals that Petitioner had also stolen a truck from a car dealership.

Petitioner again cites no legal authority to support his conclusory assertions, much less establishes that each of the above incidences constitutes objectionable hearsay. Even assuming the statements in question are hearsay, however, any objection by counsel would have been futile because the facts of the underlying offenses (Petitioner threatened his parole officer and stole guns and a truck) would still be admissible. As noted by Respondent, had counsel objected to these statements as hearsay, the prosecution only had to re-ask the questions in a different manner in order to establish each of the underlying offenses. Thus, trial counsel was not deficient in failing to file what would ultimately be a pointless objection. *Ward v. Dretke*, 420 F.3d 479, 498 (5th Cir. 2005) (counsel not ineffective for failing to lodge what would likely have been a futile objection).

Regardless, Petitioner fails to demonstrate that the results of the proceeding would have been different had a hearsay objection been successful. *Strickland*, 466 U.S. at 694. As demonstrated in this Court's summary of the trial testimony, the most damaging aspect of Officer Hilliker's testimony was not that Petitioner stole guns and a truck, but that he threatened the lives of the officer and his family if the officer did not immediately drop his investigation. Moreover, both Hilliker and Lev's testimony were only a small part of the State's overwhelming evidence of Petitioner's future dangerousness. *See* Section C(4)(c), *supra*. There is therefore no merit to Petitioner's bald assertion that the results of the punishment phase would have been different had counsel raised the above hearsay objections.

8. Victim-Impact Evidence (Claim II(F))

In his next IATC allegation, Petitioner contends counsel were ineffective for not objecting to the prosecution's presentation of extraneous victim-impact and victim-character evidence at the punishment phase. Petitioner references *Payne v. Tennessee*,[22] which lifted the *per se* bar against victim-impact testimony under the Eighth Amendment and delegated to the states whether to admit such evidence at sentencing. Under *Payne*, the admission of such evidence violates due process only if the evidence "is so unduly prejudicial that it renders the trial fundamentally unfair." 501 U.S. at 824-25. In Texas, victim-impact and victim-character evidence relating to a victim not named in the indictment is considered inadmissible because the danger of unfair prejudice to a defendant is "unacceptably high." *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) (holding that "[t]he admission of such evidence would open the door to admission of victim-impact evidence arising from *any* extraneous offense committed by a defendant.") (emphasis in original). Any error in the admission of this evidence, however, is subject to a harmless error analysis in state court. *Id.* at 637-38.

[22] 501 U.S. 808, 825 (1991).

In this case, the State presented victim-impact and victim-character testimony relating to Amanda Benefield and Tiffany Dotson, two victims not named in the indictment. The State first presented the testimony of Carroll Vaughn, Amanda Benefield's grandmother, who testified that despite her violent and troubled childhood, Benefield was a "happy girl" who "loved life." 26 RR 64-71. Vaughn believed that "all Amanda Kay ever wanted was [the] love that she never had," and thought "it's so sad the life that she lived as a brutal death that she had." *Id.* at 71. The State then presented the testimony of Mary Dotson, Tiffany Dotson's step-mother, who stated that her step-daughter was an "outgoing, fun-loving child," was "a big animal lover," and was "the love of our life." *Id.* at 75-81. Dotson stated that her step-daughter's death "was the nightmare that parents have when you let your children go out and . . . sometimes bad things happen and this is—that was the worst. It was horrible." *Id.* at 81.

Petitioner contends counsel were ineffective for failing to object to this extraneous victim-impact and victim-character testimony because it was inadmissible under Texas law. Like the error in *Cantu*, Petitioner asserts it was error to admit the testimony of Carroll Vaughn and Mary Dotson because their testimony concerned two victims who were not named in the indictment. Respondent concedes that "some" of the above testimony may have been erroneously admitted without objection (ECF No. 99 at 208), and this Court agrees. *See Cantu*, 939 S.W.2d at 637 (holding victim-impact testimony from a mother of a victim not named in the indictment is not relevant since the defendant "was not on trial for her murder and such evidence serves no purpose other than to inflame the jury."). But the Court need not address whether counsel was deficient for not objecting to this evidence because Petitioner failed to demonstrate that he was prejudiced as a result. *Pondexter v. Quarterman*, 537 F.3d 511, 520 (5th Cir. 2008) (finding that an IATC claim may be rejected for want of either deficient performance or

prejudice, and thus the absence of either prong of the *Strickland* analysis is dispositive) (citing *Strickland*, 466 U.S. at 697).

As in *Cantu*, any error in admitting the testimony of Carroll Vaughn and Mary Dotson was harmless beyond a reasonable doubt. 939 S.W.2d at 637 (holding that erroneous admission of extraneous victim-impact testimony at punishment was harmless where the testimony comprised fewer than 20 pages out of 700 pages of testimony, the state did not mention the testimony during argument, and the overwhelming focus during punishment phase was on Cantu's behavior and the circumstances of the offense). The testimony of the two witnesses at issue here amounted to only 16 pages out of roughly 625 total pages of testimony and was not mentioned by the State at closing argument. Moreover, the overwhelming focus of the State during Petitioner's penalty phase was that Petitioner was responsible for four premeditated murders, bragged about the murders and taunted the authorities afterward, and has a history of threatening law enforcement officers and their families. *See* Section C(4)(c), *supra*. Thus, contrary to Petitioner's assertion, the admission of the testimony "was not so unduly prejudicial that it render[ed] the trial fundamentally unfair." *Payne*, 501 U.S. at 824-25.

For this reason, Petitioner fails to show that there was a reasonable probability that, but for counsels' failure to object, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Johnson v. Blackburn*, 778 F.2d 1044, 1050 (5th Cir. 1985) ("If an error is shown to be harmless, then the error cannot satisfy the prejudice prong of *Strickland*."). Consequently, Claim II(F) is insubstantial and does not warrant federal habeas relief.

9. Parole Evidence (Claim II(G))

Petitioner contends trial counsel were ineffective for failing to develop and present evidence that, if given a life sentence, there was an extremely low probability Petitioner would

be released on parole. To support this allegation, Petitioner provides only a one-page response from TDCJ to an open records request indicating that, of the 1,976 offenders in TDCJ serving a life sentence for capital murder, only five had been released to parole since 1995. (ECF No. 90-15 at 2). Petitioner does not provide the name of any witness counsel could have called to testify about this information.

Once again, to prevail on an IATC claim based on counsels' failure to call a witness (either a lay witness or an expert witness), the petitioner must name the witness, demonstrate the witness was available to testify, delineate the content of the witness's proposed testimony, and show the testimony would have been favorable to the defense. *Gregory,* 601 F.3d at 352; *Day*, 566 F.3d at 538. Although Petitioner arguably states the content of the proposed testimony, he fails to name a witness or demonstrate that the witness was available to testimony, much less establish that the testimony would have been favorable to the defense. Petitioner's IATC claim is therefore a non-starter.

Even assuming counsel was deficient in not locating and presenting a witness to testify about the low probability of parole, Petitioner fails to demonstrate that he was prejudiced under the second prong of *Strickland*. The record shows Petitioner received a jury instruction which adequately informed the jury on Petitioner's parole eligibility if sentenced to life.[23] Because, at the time of his conviction, Petitioner would be eligible for parole if sentenced to life

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[23] The jury was instructed as follows (1 CR 271):

> Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

imprisonment, this instruction was more than Petitioner was entitled to under federal law. *See Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (holding a jury instruction on parole eligibility is only required when state law prohibits the defendant's release on parole and the defendant's future dangerousness is at issue); *Elizalde v. Dretke*, 362 F.3d 323, 332-33 (5th Cir. 2004) (same).

Moreover, any attempt by counsel to supplement this instruction with testimony concerning the likelihood of Petitioner's parole if sentenced to life may not have been admitted by the trial court. *See Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995) (holding that it was not error for a trial court to refuse the admission of testimony concerning parole because parole is not a matter for a jury's consideration in a capital murder trial). Even if it were admitted, it is unlikely the results of Petitioner's punishment phase would have been different because of such testimony, particularly given the overwhelming nature of the evidence presented by the State establishing Petitioner's future dangerousness. *Strickland*, 466 U.S. at 698 (finding no prejudice due to State's overwhelming evidence on aggravating factors supporting the death penalty); *Russell*, 892 F.2d at 1213 (finding no ineffective assistance "[g]iven the weakness of such testimony when juxtaposed with the overwhelming evidence of guilt, the horrifying nature of the crime, and the abundant impeachment material available to the State").

Again, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S at 112. Petitioner has not made this showing. Thus, his complaint about trial counsels' failure to present evidence regarding the low probability of Petitioner's parole is insubstantial and fails to satisfy either prong of *Strickland* analysis.

10. The Prosecution's Closing Argument (Claim II(H))

In his next claim, Petitioner alleges that the prosecution's closing argument at the punishment phase was "improper essentially from start to finish" but that counsel failed to raise a single objection. Specifically, Petitioner contends the prosecution: (1) argued facts not in evidence to ridicule defense witnesses, (2) made burden-shifting arguments that faulted the defense for not presenting certain evidence, (3) instructed the jury to ignore the defense's mitigating evidence because it did not relate directly to the underlying offense, and (4) incorrectly instructed the jury that a death sentence was required due to a lack of mitigating evidence. Because they lacked a reasonable basis for failing to raise an objection to these arguments, Petitioner asserts counsels' performance was deficient and that he likely would not have been sentenced to death had counsel performed adequately.

It is well settled that "the failure to lodge futile objections does not qualify as ineffective assistance." *Roberts*, 681 F.3d at 612; *Koch*, 907 F.2d at 527. Indeed, decisions to object or not object during closing argument are matters of trial strategy that are presumed reasonable under *Strickland*. *Wiley v. Puckett*, 969 F.2d 86, 102 (5th Cir. 1992). Thus, in order to show that counsel was deficient for failing to object under the first prong of *Strickland*, Petitioner must establish that the proposed objections would have had merit. *Turner v. Quarterman*, 481 F.3d 292, 298 (5th Cir. 2007). Generally speaking, the four proper areas for prosecutorial jury argument are summation of the evidence, reasonable inference from the evidence, answers to opposing counsel's argument, and pleas for law enforcement. *See Norris v. Davis*, 826 F.3d 821, 832 n.10 (5th Cir. 2016) (recognizing these as the four proper areas for prosecutorial argument in Texas). Because the arguments made by the prosecution clearly fell within one of these categories, counsel were not ineffective for failing to raise an objection.

a. Facts Not in Evidence

Petitioner first contends that the prosecution argued facts not in evidence to disparage two defense experts, Dr. Jacobvitz and Dr. Proler. With regard to Dr. Jacobvitz, the prosecution made the following commentary:

> But what's her other research project? *Her other research project features you, folks, as the guinea pigs*. She[] was located by John Nyland with the Texas Defender Service. He recruited her to come up here and just start rambling about childhood development and neglectful childhood and things like that in the hopes, in the hopes that you folks will say, okay, that sounds like mitigation to me, so there it is. It's mitigating. That way if you folks buy into that *she can get on the statewide testifying bandwagon* and travel from capital to capital trial and talk about the same things again and ignore facts and ignore evidence and not really care whether people lied to her or not.

29 RR 49-50 (emphasis added). This statement, while critical of Dr. Jacobvitz's motivations, contains reasonable inferences from her earlier testimony. Although she was unaware of exactly what the Texas Defender Service did, Dr. Jacobvitz's testified that she had written and conducted research projects involving her area of expertise and that, while she hadn't testified before, she thought this case was "really interesting" and would help her research. 28 RR 88-131. It is thus a reasonable inference that she would use the outcome of this case as part of her research. It is also reasonable to assume that, if her testimony assisted the defense in obtaining a life sentence over the death penalty, Dr. Jacobvitz might be willing to testify again, if she were asked, due to her interest in these issues. An objection by counsel was therefore not required.

Similarly, the prosecution's questioning of Dr. Proler was not improper. On cross-examination, the prosecution questioned Dr. Proler at length regarding the basis of his testimony in previous death penalty trials and about his failure to mention that he had also conducted a quantitative EEG on Petitioner in addition to the non-quantitative EEG which was the subject of his testimony. *Id.* at 19-26. During closing, the prosecution then discussed Dr. Proler's reluctance to mention the quantitative EEG:

> And did Dr. Proler strike you as the kind of guy that was really out there and wanting to tell you all the information that he had?
>
> You know, Dr. Proler, you said you did a quantitative EEG. Well, I didn't mention that.
>
> Apparently the last case in Harris County some prosecutor apparently just skinned him and that's why he is somewhat reluctant to say of anything on the stand.

29 RR 45. Because this line of questioning was a reasonable inference from Dr. Proler's cross-examination testimony, counsel were not ineffective for not lodging an objection.

b. Burden-shifting

Petitioner next faults counsel for not objecting to the prosecution's repeated comments on the defense's failure to present Petitioner's father, Robert Tabler, as a witness. According to Petitioner, these comments violated his due process rights by shifting the burden of proof from the prosecution to the defense. But during the defense's argument, counsel repeatedly blamed Petitioner's father for how his son turned out. *See, e.g.,* 29 RR 19 (stating the "first conscious thought his father had of him was abort it."), 20 ("Can you conceive of a parent who is so detached from their child that as he's tried for capital murder the man can't come here?"), 28 ("Not getting much attention from dad."), 31 ("And when Robert Tabler says, when [Petitioner]'s first conceived, get rid of him, what does that tell you about how he's going to treat him after that?"), 32 (implying Robert had "no clue" what Petitioner was like as a child). As such, the prosecution's argument was merely a response to the argument by defense counsel attempting to place blame onto Robert Tabler without presenting him as a witness to confirm or refute the accusations. Because the prosecutor's comments were made in response to argument by opposing counsel, counsel were not ineffective for failing to object. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) ("Jury argument [in Texas] is appropriate if it falls within one of the following: (1) a summation of the evidence; (2) a reasonable deduction from

the evidence; (3) an answer to argument of opposing counsel; and (4) a plea for law enforcement.").

c. Instructions to Ignore Evidence

Next, Petitioner claims counsel should have objected to the prosecutor's repeated instructions to the jury to ignore mitigating evidence because it did not directly relate to the crimes for which he was convicted. Citing *Tennard v. Dretke*,[24] Petitioner contends the prosecutor's argument violated his Eighth Amendment rights because the jury was precluded from giving effect to the mitigating evidence he presented. This allegation was raised by Petitioner during his direct appeal proceedings and rejected on the merits by the Texas Court of Criminal Appeals. *Tabler v. State*, 2009 WL 4931882 *3. The allegation was also raised and rejected on the merits during Petitioner's original federal habeas proceedings by both the district court and the Fifth Circuit on appeal. ECF No. 42; *Tabler v. Stephens*, 588 F. App'x at 308-09.

Again, the purpose of the Fifth Circuit's remand in this case is to determine whether Petitioner can establish cause under *Martinez* to excuse the procedural default of any IATC claim he could raise with the assistance of new counsel. Because this allegation has been fully adjudicated on the merits in both state and federal court, *Martinez* does not apply. *See Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014) ("*Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted."). Even if it did, Petitioner's allegation was already rejected by Judge Smith in his 2012 Order, which was affirmed by the Fifth Circuit on appeal. Petitioner fails to provide a sufficient reason for this Court to now reconsider a claim that has already been

[24] 542 U.S. 274, 287 (2004).

rejected by three different courts. Thus, Petitioner's claim does not warrant federal habeas corpus relief.[25]

d. Incorrect Statement of Law

In his last allegation concerning the prosecution's closing argument, Petitioner contends counsel were ineffective for failing to object to the prosecution's repeated instructions to the jury that they had "no choice" but to return a death sentence verdict because the defense failed to present a single mitigating circumstance. Citing *Caldwell v. Mississippi*,[26] Petitioner states that the prosecution removed the jury's sense of responsibility for their decision by arguing that there is "nothing in evidence that excuses, explains, or more importantly mitigates what he did" and "nothing that reduces [Petitioner's] blameworthiness. . ." 29 RR 59. Petitioner's allegation is insubstantial.

In reviewing a *Caldwell* claim, the proper inquiry is whether, under all the facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of the imposition of the death penalty rests elsewhere. *See Dugger v. Adams*, 489 U.S. 401, 407 (1989) (finding a defendant "must show that the remarks to the jury improperly described the role assigned to the jury by local law" to establish a *Caldwell* violation). There is nothing about the prosecution's closing argument in this case which could be rationally construed as misleading the jury regarding its ultimate responsibility for imposing the sentence of death upon Petitioner. Indeed, a careful review of the prosecution's argument reveals that the remarks were either

[25] In fact, if the Court were to review the claim again on the merits, it would have to be dismissed as successive under the plain language of the AEDPA because the claim has already been litigated on the merits in Petitioner's original habeas proceedings. *See Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010) (citing 28 U.S.C. § 2244(b)(1)).

[26] 472 U.S. 320 (1985).

reasonable deductions from the evidence presented at punishment or were proper pleas for law enforcement. Because both of these are proper areas for prosecutorial jury argument, counsel was not deficient for lodging what would have been a futile objection. *Roberts*, 681 F.3d at 612.

e. No Prejudice

Alternatively, even assuming the foregoing arguments were improper, Petitioner fails to demonstrate prejudice under the second prong of *Strickland*. For a reviewing court, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "Such unfairness exists 'only if the prosecutor's remarks evince either persistent and pronounced misconduct or . . . the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred.'" *Harris v. Cockrell*, 313 F.3d 238, 245 (5th Cir. 2002) (quoting *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281 (5th Cir. 1985)). Petitioner fails to make this showing as well.

As previously discussed, the arguments by the prosecution in this case were made, in part, as a response to defense counsels' arguments or were a reasonable summation of, or inference from, the evidence presented. They were neither persistent nor pronounced in nature. The jury was also instructed to consider all of the evidence presented, and was told "time and time again" that the lawyer's statements are not to be considered evidence. 1 CR 271, 273; 29 RR 15, 40 ("What we say is not evidence."). Moreover, this was not a close case at punishment, as the evidence submitted by the prosecution—including evidence that Petitioner committed four murders, taunted police, and had a history of threatening law enforcement officials—was overwhelming. For these reasons, Petitioner fails to establish *Strickland* prejudice. *See Darden*,

477 U.S. at 182 (holding that prosecutor's argument, while improper, did not render trial unfair where argument did not misstate the evidence, did not implicate a specific right, was responsive to the defense, and the jury was instructed that counsel's arguments were not evidence, and the weight of evidence against defendant was heavy). Petitioner's claim is therefore insubstantial and does not warrant relief.

11. Counsels' Closing Argument (Claim II(I))

In addition to failing to object to the State's closing argument, Petitioner contends counsel were ineffective for presenting a closing argument themselves that was "inflammatory, harmful and in conflict" with the evidence they presented at the punishment phase. Again, to prevail on such an allegation, Petitioner must show both that "counsel's representation fell below an objective standard of reasonableness" and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v. Spisak*, 558 U.S. 139, 149 (2010) (citing *Strickland*, 466 U.S., at 688, 694). Petitioner does neither.

Petitioner correctly notes that the defensive strategy for the punishment phase was to demonstrate that Petitioner was "not normal," and that he suffered from a neglectful upbringing and a lifelong history of behavioral problems and mental illness. Citing to isolated examples of counsels' arguments that allegedly debased their client, inflamed the jury, and undermined the testimony of defense experts, Petitioner now contends that counsel abandoned this strategy during closing argument. But in considering whether counsels' closing arguments were ineffective, the Court must consider the closing statements in their entirety. *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997); *Teague v. Scott*, 60 F.3d at 1173. This is because trial counsel have broad discretion when it comes to deciding how best to proceed during a closing argument.

See Ward, 777 F.3d at 264 (the Supreme Court has emphasized counsel has "wide latitude in deciding how best to represent a client"); *Clark v. Thaler*, 673 F.3d 410, 427 (5th Cir. 2012) (recognizing the broad deference to which counsel is entitled in making tactical decisions in closing argument) (quoting *Yarborough*, 540 U.S. at 5-6).

When looking at the entire record, it is clear that counsel did not abandon their defensive strategy as Petitioner now asserts. While at times inartful, both trial counsel—Robert Harris and John Donahue—repeatedly insinuated throughout their arguments, either directly or indirectly, that Petitioner should not be given the death penalty because he was "flawed" and "not normal." *See, e.g.,* 29 RR 17 (stating Petitioner was "flawed" and that his soul was "probably broken before it was born"), 21 (implying Petitioner was "damaged"), 28 (stating people started noticing from an early age Petitioner "just isn't right"), 30 (Petitioner "not normal" and should not be held to same level of accountability as a "normal" person). Both counsel also spent a significant portion of argument time blaming Petitioner's neglectful upbringing for his flaws. *Id.* at 19-20 (explaining that Petitioner did not have the "luxury" of having his father present or a mother who filled in that role, and noting Petitioner's father initially wanted him aborted and did not even show up for trial), 23-24 (suggesting his mother's abandonment as a reason for Petitioner's flaws), 28 ("And if you want to look at a child, look at the parents"), 31-32 (recounting testimony regarding neglectful childhood and that nobody recognized a need for help until it was too late). Counsel also touched on the mental health evidence presented at punishment. *Id.* at 18-20 (summarizing testimony from the defense's three experts), 21 (each expert came to their own conclusions and agreed Petitioner was "damaged goods"), 30-31 (Petitioner has a mental disorder which renders him unable to control his worst impulses).

In closing, counsel then explained their strategy once more to the jury: "What we tried to do is explain to you where [Petitioner] came from, why he is the way he is, [and] what happened in his life." Although Petitioner faults counsel for not "endorsing" the testimony of his experts further, their closing arguments accomplished all of their stated goals and served to "sharpen and clarify the issues for resolution" by the jury. *Clark*, 673 F.3d at 427 (quoting *Yarborough*, 540 U.S. at 6). While in hindsight Petitioner may wish that counsel presented a different closing argument, given the wide range of available strategies, reiterating the testimony given by experts in more detail was not required. *See Ries v. Quarterman*, 522 F.3d 517, 529 (5th Cir. 2008) ("[Ries's] desire to have a specific defense theory presented does not amount to ineffective assistance on federal habeas review") (citing *Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007)).

In sum, the Court concludes that the arguments given by counsel, as a whole, were the product of objectively reasonable representation that fell within "the wide range of reasonable professional assistance" and did not constitute ineffective assistance. *Strickland*, 466 U.S. at 689. Moreover, for the reasons discussed in the previous section, Petitioner cannot demonstrate prejudice. *See* Section C(10)(e), *supra*. Thus, because he fails to satisfy either prong of the *Strickland* analysis, Petitioner's claim is insubstantial and does not warrant federal habeas relief.

12. Petitioner's Eligibility for the Death Penalty (Claim III)

In Claim III, Petitioner contends trial counsel were ineffective for not asserting that his congenital birth defects—KS and FASD—and resultant mental impairments rendered him ineligible for the death penalty. Because individuals who suffer from KS and FASD exhibit many of the same executive and adaptive functioning deficits as those exhibited by the intellectually disabled, Petitioner contends the Supreme Court's prohibition on the execution of

the intellectually disabled under *Atkins v. Virginia*[27] should logically extend to the execution of those with severe mental illness. Petitioner's allegation lacks merit for the following reasons.

To start, contrary to Petitioner's assertion, trial counsel did attempt to preclude the death penalty as a sentencing option based on Petitioner's severe mental illness. Prior to trial, counsel filed a lengthy motion arguing the constitutional protections provided for the intellectually disabled under *Atkins* should apply equally to those, such as Petitioner, who suffer from a severe mental illness. 1 CR 134-42. Counsel made the same arguments at a pre-trial hearing on the motion, but the trial court ultimately denied the motion prior to the close of the punishment phase. 8 RR 4-25; 29 RR 8. Although counsel did not specifically mention any diagnosis of KS or FASD in their motion or at the pre-trial hearing, the argument presented by counsel is virtually identical to the one Petitioner now claims they should have made. That is, due to their impaired judgment, reasoning, and impulse control, those who suffer from severe mental illness are "morally indistinguishable" from the intellectually disabled because "they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." ECF No. 90 at 279 (citing *Atkins*, 436 U.S. at 306). Any argument by counsel concerning Petitioner suffering from KS or FASD would therefore have been redundant.

Furthermore, as discussed previously by this Court in its February 2012 Order denying federal habeas relief (ECF No. 42 at 16), such a motion would be futile because the prohibitions against executing the intellectually disabled have not been extended to individuals who may be mentally ill, including those who suffer from KS or FASD. *See Soliz v. Davis*, 750 F. App'x 282, 291 (5th Cir. 2018) (unpublished) (upholding rejection of argument that *Atkins* should be expanded to make those afflicted with FASD categorically ineligible for the death penalty); *Shore v. Davis*, 845 F.3d 627, 634 (5th Cir. 2017); *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir.

[27] 536 U.S. 304 (2002).

2014); *ShisInday v. Quarterman*, 511 F.3d 514, 521 (5th Cir. 2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006). Petitioner points to no Supreme Court decision recognizing an extension of *Atkins* to those suffering from KS or FASD, much less mental illness in general.

Consequently, any argument by trial counsel on these grounds would have been just as unsuccessful as the motion actually filed. Counsels' failure to raise this meritless argument does not constitute a meritorious IATC claim because counsel is not required to raise futile objections, and the result of the proceeding would not have been different even if they had. *Roberts*, 681 F.3d at 612 ("[T]he failure to lodge futile objections does not qualify as ineffective assistance.") (quoting *Koch*, 907 F.2d at 527); *Ward*, 420 F.3d at 498 (same). Claim III is therefore insubstantial and does not warrant federal habeas relief.

17. Petitioner's Cumulative-Error Claims (Claims I(E) and II(J))

Finally, Petitioner argues that even if none of the above allegations independently entitle him to relief, their cumulative prejudicial effect denied him his right to the effective assistance of counsel at both the guilt/innocence and punishment phases of trial. The Fifth Circuit has made it clear that cumulative-error analysis applies only in "rare instances" where there is constitutional error to cumulate. *United States v. Delgado*, 672 F.3d 320, 344 (5th Cir. 2012) (en banc); *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir. 1991). "Meritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised." *Pondexter v. Quarterman*, 537 F.3d 511, 525 (5th Cir. 2008).

As discussed throughout this opinion, none of the claims raised by Petitioner establish that trial counsels' performance was deficient under the *Strickland* analysis. Even if counsel were considered deficient in one or more of the allegations, this Court has found no instances where Petitioner was prejudiced by counsels' allegedly deficient conduct. Accordingly, there is

no prejudicial effect for this Court to cumulate. *United States v. Thomas*, 724 F.3d 632, 648 (5th Cir. 2013) ("[T]here is no precedent supporting the idea that a series of 'errors' that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in *Strickland*."); *United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006) ("Our clear precedent indicates that ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions"). *Pondexter*, 537 F.3d at 525 (finding "[m]eritless claims or claims that are not prejudicial cannot be cumulated"). Petitioner's cumulative-error claims therefore are neither substantial nor do they warrant federal habeas corpus relief under a *de novo* standard of review.

IV. Certificate of Appealability

The Court must now determine whether to issue a certificate of appealability (COA). *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; *Miller-El v. Cockrell,* 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)). Under 28 U.S.C. § 2253(c)(2), a COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." This requires Petitioner to show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citing *Miller-El*, 537 U.S. at 327).

The Supreme Court has explained that the showing required under § 2253(c)(2) is straightforward when a district court has rejected a petitioner's constitutional claims on the merits: The petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The issue becomes somewhat more complicated when the district court denies relief

on procedural grounds. *Id.* In that case, the petitioner seeking COA must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack,* 529 U.S. at 484). Whatever the basis for the denial, however, the court must bear in mind that "[w]here the petitioner faces the death penalty, 'any doubts as to whether a COA should issue must be resolved' in the petitioner's favor.'" *Allen v. Stephens*, 805 F.3d 617, 625 (5th Cir. 2015) (quoting *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

In this case, the Court was tasked with determining whether, under *Martinez v. Ryan*, Petitioner has established (1) the ineffectiveness of his state habeas counsel, and (2) a substantial IATC claim. *Garza*, 738 F.3d at 676; (ECF No. 64). For the first prong, Petitioner presented significant evidence of mental health issues and argued state habeas counsel were ineffective for failing to challenge his competency to waive his appeals. Given this evidence and the fact that COA should issue in a death penalty case if any doubt exists, the Court concludes the issue of the effectiveness of Petitioner's state habeas counsel deserves encouragement to proceed further. Accordingly, the Court will grant Petitioner a COA on whether Petitioner's state habeas counsel rendered ineffective assistance for failing to challenge his competency.

For the second prong of the *Martinez* analysis, the Court similarly concludes that Petitioner's Claim II(F) deserves encouragement to proceed further. In that allegation, Petitioner argued his trial counsel were ineffective for failing to object to the presentation of extraneous victim-impact testimony at the punishment phase of trial. While recognizing that some of this testimony may have been admitted erroneously, the Court nevertheless found the claim to be

insubstantial because the admission of the testimony in question was harmless. *See* Section C(8), *supra*. However, the question of whether the testimony was so "unduly prejudicial that it render[ed] the trial fundamentally unfair" is a close and difficult one, and this Court acknowledges that a different jurist might reasonably reach a different determination as to whether petitioner was prejudiced by counsels' failure to raise such an objection. *Payne*, 501 U.S. at 824-25. The Court will therefore grant Petitioner a COA on Claim II(F) as to whether Petitioner was prejudiced by trial counsels' failure to object to this evidence.

For the remaining IATC claims raised by Petitioner, he has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nor could reasonable jurists debate the denial of federal habeas corpus relief on either substantive or procedural grounds, or find that the issues presented are adequate to deserve encouragement to proceed further. *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). As such, no further COA is warranted.

V. Conclusion and Order

The Court has thoroughly reviewed the extensive record and pleadings submitted by both parties in this case, as well as the 1,000-plus pages of exhibits submitted on Petitioner's behalf (ECF Nos. 90, 93, 94, 121, 122, 132, 133). After careful consideration, the Court concludes the new IATC allegations raised in Petitioner's amended petition (ECF No. 90) are unexhausted and procedurally barred and that Petitioner fails to establish cause to excuse the procedural bar pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). Alternatively, even when evaluated under a *de novo* standard of review, these claims do not warrant federal habeas relief because they lack merit.

Accordingly, based on the foregoing reasons, **IT IS ORDERED** that:

1. Federal habeas corpus relief is **DENIED** and Petitioner Richard Lee Tabler's Amended Petition for Writ of Habeas Corpus on Remand (ECF No. 90) is **DISMISSED WITH PREJUDICE**;

2. A limited Certificate of Appealability is **GRANTED** in this case; and

3. All other remaining motions are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 10th day of June, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

588 Fed.Appx. 297
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

Richard Lee TABLER, Petitioner–Appellant
v.
William STEPHENS, Director, Texas Department Of Criminal Justice, Correctional Institutions Division, Respondent–Appellee.

No. 12–70013.
|
Oct. 3, 2014.

Synopsis

Background: Petitioner convicted in state court of capital murder and sentenced to death filed petition for writ of habeas corpus. The United States District Court for the Western District of Texas denied the petition. Petitioner sought certificate of appealability (COA).

Holdings: The Court of Appeals, Edith Brown Clement, Circuit Judge, held that:

postconviction competency hearing to determine if petitioner's waiver of his right to postconviction proceedings was voluntary and knowing did not violate due process;

defense counsel did not provide ineffective assistance at postconviction competency hearing;

denial of habeas relief was not rendered unreliable by District Court's failure to have access to entire state trial court transcript; and

defense counsel did not render ineffective assistance of by failing to object to the prosecution's argument about mitigating evidence during penalty phase.

COA denied.

James L. Dennis, Circuit Judge, filed dissenting opinion.

Attorneys and Law Firms

***298** Marcia Adele Widder, Atlanta, GA, for Petitioner–Appellant.

Fredericka Searle Sargent, Assistant Attorney General, Office Of The Attorney General, Austin, TX, for Respondent–Appellee.

Appeal from the United States District Court for the Western District of Texas, USDC No. 6:10–CV–34.

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

Opinion

EDITH BROWN CLEMENT, Circuit Judge:*

Petitioner Richard Tabler was convicted in Texas state court of capital murder and sentenced to death. While Tabler's mandatory direct appeal was pending with the Texas Court of Criminal Appeals, Tabler requested to waive his remaining postconviction appellate rights and the trial court granted his request after determining that he was competent to do so. Following the denial of his direct appeal, Tabler attempted to reinstate his right to state habeas proceedings. The Court of Criminal Appeals denied the motion. Tabler then filed a petition for habeas corpus relief in federal district court, which denied his petition and found that a certificate of appealability (COA) should not issue. Tabler now requests that this court grant a COA pursuant to 28 U.S.C. § 2253(c). For the reasons that follow, Tabler's application for a COA is denied.

Facts And Proceedings

I. Conviction and Sentencing

On March 21, 2007, Tabler was convicted of capital murder for the shooting deaths of Mohamed–Amine Rahmouni and Haitham Zayed. During the penalty phase of his trial, the State presented to the jury Tabler's confession that he murdered two women for spreading news of his crimes. Tabler admitted to luring the women to a lake with the promise of drugs and then shooting them each multiple times with the same gun used to murder Rahmouni and Zayed. The jury heard further testimony that Tabler had a history of threatening law enforcement officers and fellow inmates.

Tabler's trial counsel presented mitigating evidence in an attempt to show that Tabler was "not normal" and therefore undeserving of the death penalty. This evidence included: (1) testimony from Tabler's mother and sister about his difficult childhood, potential birth trauma, and history ***299** of psychiatric treatment; (2) testimony from Dr. Meyer Proler, a clinical neurophysiologist, concerning an abnormality of the left temporal frontal region of Tabler's brain that causes difficulty learning, planning, and weighing the consequences of actions; (3) testimony from Dr. Susan Stone, a psychiatrist, that Tabler suffered from a severe case of attention deficit hyperactivity disorder, borderline personality disorder, and a history of head injuries, all of which inhibited his ability to rationally assess situations and control his impulses; and (4) testimony from Dr. Deborah Jacobvitz, a psychologist, regarding the impact of parental neglect and abandonment on Tabler's development.

In rebuttal, the state called Dr. Richard Coons, a psychiatrist, who diagnosed Tabler as having antisocial personality disorder. Dr. Coons testified that although individuals with antisocial personality disorder may lack remorse or concern

for others, they are not compelled to commit criminal acts. Following the State's rebuttal, both parties presented closing arguments. During the State's closing, the prosecutor argued that Tabler's troubled childhood did not mitigate his culpability because it was not related to the crimes for which he was convicted. After three hours of deliberation, the jury found that Tabler presented a continuing threat to society and that there was insufficient mitigating evidence to warrant a sentence of life imprisonment in lieu of a death sentence. *See* Tex.Code Crim. Proc. art. 37.071 § 2(b), (e). The trial court accordingly sentenced Tabler to death.

II. State Postconviction Proceedings

On April 24, 2007, attorneys David Schulman and John Jasuta were appointed as Tabler's postconviction counsel. Tabler was provided with separate counsel for his direct appeal, which ran concurrently with his postconviction habeas relief. The State filed its original brief in Tabler's direct appeal on October 1, 2008. Tabler's habeas petition was thus required to be filed no later than November 17, 2008. *See id.* art. 11.071 § (4)(a) (application for writ of habeas corpus must be filed within 180 days after the convicting court appoints counsel or 45 days after the state's original brief is filed on direct appeal, whichever date is later).

No petition for habeas relief was filed. On May 15, 2008, Tabler informed his attorneys that he wished to waive his postconviction appellate rights. On August 11, 2008, Tabler sent a letter to the Court of Criminal Appeals waiving his right to any state habeas proceedings and volunteering for execution. The Court of Criminal Appeals referred the matter to the state trial court judge who had presided over Tabler's criminal trial. The state trial court ordered a hearing on Tabler's competency to waive his appeals and ordered that Tabler undergo examination by Dr. Kit Harrison. Dr. Harrison examined Tabler on June 28, 2008, and found him to be mentally competent. At Tabler's September 30, 2008 competency hearing, the state trial court considered Dr. Harrison's evaluation; offered Tabler, his attorneys, and the State an opportunity to present additional evidence relevant to the competency determination; and questioned Tabler in open court to determine whether his waiver was knowing and voluntary. During this questioning, the judge presented Tabler with the letter he had written to the Court of Criminal Appeals and asked him to explain his request. Tabler replied: "Basically, I'm asking the Court of Appeals to drop all of my appeals after my direct appeal. And should my direct appeal be denied, I'm asking for an execution date as soon as possible." Upon Tabler's instruction, Schulman and Jasuta did not contest the State's evidence of competency. The state ***300** court found Tabler competent to waive his postconviction rights.

On June 29, 2009—nine months after the competency hearing and eight months after his habeas petition was due—Tabler requested that his postconviction rights be reinstated. On September 16, 2009, the Court of Criminal Appeals rejected Tabler's motion, finding that his decision to waive his state postconviction appeals was knowing and voluntary and that his failure to file a timely writ of habeas corpus was attributable to his own continued insistence on foregoing that remedy. The Court of Criminal Appeals denied Tabler's direct appeal on the merits three months later and Tabler filed a petition for certiorari with the United States Supreme Court.

III. Motion for Stay of Execution and Petition for Habeas Corpus in Federal Court

On February 2, 2010, Schulman and Jasuta filed a request to stay execution on Tabler's behalf in the Western District of Texas so that he could exhaust his state court remedies. The district court granted the motion pending the Supreme Court's decision on Tabler's petition for certiorari. But on June 2, 2010 Tabler personally filed a motion to reconsider the stay, claiming that his attorneys had filed the motion without his permission, and again stating his intention to proceed to execution. Tabler's motion to reconsider was forwarded to the Supreme Court along with Schulman and Jasuta's supplemental filing, in which they argued that Tabler was not competent to waive his federal appeals.

Tabler's continued attempts to drop his appeals prompted the district court to hold a second competency hearing. The court appointed Dr. Richard Saunders to perform Tabler's psychological evaluation, who concluded after examination of Tabler and review of his mental health history that Tabler was mentally competent. The district court considered Dr. Saunders' opinion and testimony at Tabler's August 17, 2011 competency hearing and determined that Tabler was mentally competent to waive his rights. The court found that Tabler "is not presently suffering from a mental disease, disorder or defect which prevents him from understanding his legal position and the options available to him or which prevents him from making a rational choice among his options." Schulman appeared to agree with this conclusion, stating to the court at the hearing: "I don't think he's incompetent in a legal sense ... we were never trying to say he's not competent in the sense to stand trial or be executed but just that his decisions are not voluntary."

Although Tabler was deemed mentally competent, the district court ruled that his waiver was not voluntary. In October of 2008—more than one month *after* his original state court competency hearing—Tabler made a threatening phone call to a state senator while on death row. An inquiry into the call ultimately led to an investigation into cell phone smuggling in the prison, which purportedly resulted in threats and harassment from prison staff and fellow inmates.

Whether or not Tabler's perception matched reality, the district court found that Tabler genuinely believed his family would be harmed if he did not volunteer for execution and therefore found his attempt to waive his federal habeas relief involuntary. On October 11, 2011, the district court denied Tabler's renewed motion to stay and abate the federal habeas proceeding to attempt to exhaust his extant state court claims because Tabler had waived those claims, the Texas trial and appeals courts had found Tabler competent to execute the waiver, and there ***301** was nothing to indicate that another attempt at exhaustion would succeed. Tabler subsequently filed a federal habeas petition on November 13, 2011.

Tabler's petition asserted fourteen grounds for relief. Because Tabler waived his state court postconviction rights, the district court held that only those issues raised on direct appeal and rejected by the Court of Criminal Appeals were exhausted, leaving four potential grounds for relief.[1] The only non-defaulted claims were that: (1) the death penalty is unconstitutional as applied to Tabler because he is mentally ill; (2) the prosecutor's closing argument at the punishment phase requiring the jury to find a nexus between mitigating evidence and the crimes of conviction violated the Eighth and Fourteenth Amendments; (3) trial counsel's failure to object to that unconstitutional argument constituted ineffective assistance of counsel; and (4) Texas's "12–10 Rule" violates the Due Process Clause. The district court denied the second claim because Tabler's trial counsel failed to object at trial and rejected the remaining three claims on the merits.

IV. Application for Certificate of Appealability

Following the denial of Tabler's habeas petition, Marcia Widder replaced Schulman and Jasuta as Tabler's habeas counsel on appeal. Tabler raises four issues in his application for a certificate of appealability: (1) whether the state court competency hearing in which Tabler waived his postconviction appeals violated his due process rights; (2) whether Tabler's postconviction counsel failed to raise meritorious claims challenging his conviction and death sentence in state and federal postconviction proceedings, thereby causing Tabler to forfeit his right to have the federal district court determine if he received effective assistance of trial and appellate counsel; (3) whether the district court's denial of his federal habeas petition without the benefit of the full state court record requires remand; and (4) whether trial counsel's failure to object to the prosecutor's purportedly unconstitutional closing argument constituted ineffective assistance of counsel.

Standard Of Review

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Tabler must obtain a COA before he is permitted to appeal the district court's denial of his

requested habeas relief. A COA will not issue under AEDPA's deferential standard of review unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The requisite showing is made by demonstrating that "reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (internal quotation marks omitted). Unless and until a COA has issued, federal courts lack jurisdiction to rule on the merits of appeals from habeas petitioners. *Miller–El v. Cockrell,* 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The standard of review for the issuance of a COA varies depending on whether the district court rejected the petition on the ***302** merits or on procedural grounds only. If the district court denied the claim for relief on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack,* 529 U.S. at 484, 120 S.Ct. 1595. If the claim was denied on procedural grounds, the petitioner bears the additional burden of showing "that jurists of reason would [also] find it debatable whether the district court was correct in its procedural ruling." *Id.*

AEDPA provides that when a habeas claim has been adjudicated on the merits in state court, a federal district court may not grant habeas relief unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). A state court's findings of fact are presumed to be correct unless the petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Discussion

I. The State Postconviction Competency Hearing Did Not Violate Tabler's Due Process Rights

As an initial matter, we need not reach Tabler's due process claim because it was not presented to the district court. *Parr v. Quarterman,* 472 F.3d 245, 261 (5th Cir.2006) ("We generally will not consider an issue raised for the first time in a COA application."). Tabler's Rule 59(e) motion requesting that the district court amend its judgment because counsel

effectively abandoned him at the state competency hearing is not sufficient to have preserved the issue for appeal. *See Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990) (Rule 59(e) motions "cannot be used to raise arguments which could, and should, have been made before the judgment issued.").[2] But because the adequacy of the state competency hearing is relevant to Tabler's claim of ineffective assistance of counsel and attendant argument that such ineffective assistance provides cause for his procedural default, we will explain here why his due process challenge also fails on the merits.

Unlike the factual findings of the trial judge that derive from the competency hearing, the adequacy of the fact-finding procedure itself is a question of law that we review de novo. *Mata v. Johnson,* 210 F.3d 324, 327 (5th Cir.2000). A competency hearing provides constitutional due process if the hearing court (1) orders and reviews a current examination by a medical or mental health expert, (2) allows the parties to present any other relevant evidence on the question of competency, and (3) if the judge—on the record and in open court—questions the petitioner "concerning the knowing and voluntary nature of his decision to waive further proceedings." ***303** *Id.* at 331.[3]

There is no question that Tabler's state hearing satisfied this standard. First, the trial court appropriately ordered an evaluation of Tabler's mental health by Dr. Harrison following Tabler's request to waive his right to postconviction collateral proceedings. Dr. Harrison's examination ten weeks before Tabler's competency hearing was sufficiently current to satisfy due process concerns. *See Murray,* 243 Fed.Appx. at 54 (five-month-old expert report satisfied due process).

Second, it is undisputed that the trial court provided Tabler and his attorneys an *opportunity* to present any evidence they deemed relevant to the competency determination. The thrust of Tabler's argument is that his attorneys' failure to accept the court's invitation to challenge his competency rendered the hearing non-adversarial and thus constitutionally deficient. But as the term "due process" suggests, the inquiry is concerned only with whether a meaningful opportunity to present evidence was provided, not whether such evidence was in fact presented. *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (internal quotation marks omitted)); *see also Mata,* 210 F.3d at 331 (competency hearing affords petitioner due process by "*allowing* the parties to present any other evidence relevant to the question of competency." (emphasis added)).[4]

Third, the court questioned Tabler in open court and on the record to determine that his waiver was both knowing and voluntary. In response to questions from the court, Tabler

affirmed that he had conferred with his counsel and did not wish to file a state habeas petition, and that he understood that if his direct appeal was denied, he would be executed. The court also showed Tabler the letter he had written to the Court of Criminal appeals stating his intention to waive postconviction relief and asked Tabler to explain his request. Tabler replied that he was "asking the Court of Appeals to drop all of my appeals after my direct appeal. And should my direct appeal be denied, I'm asking for an execution date as soon as possible." After confirming that Tabler had not changed his mind since authoring the letter, the court warned Tabler that if he should reverse course and decide to file a petition, the Court of Appeals would consider it untimely and might decline to entertain it, to which Tabler replied that he understood.[5] This was clearly sufficient ***304** under *Mata. Mata,* 210 F.3d at 330–31 (the trial court "should seek to elicit a narrative response from the defendant that he has been advised of his rights, that he understands the details and has discussed the matter with his attorney, and that he wishes to waive his constitutional protections.").

Finally, several of Tabler's challenges to the state court competency hearing are challenges to the court's factual finding of competency, not the process itself.[6] In this regard, Tabler offers only his attorney's opinion that he is incompetent, his criticism of Dr. Harrison's testimony as unreliable, and the district court's finding in the federal competency hearing that Tabler's attempted waiver of his federal habeas rights was involuntary. As to Tabler's argument that the result of his federal competency hearing undermines the state court conclusion, a defendant's competency is determined at the time the waiver is made. And the federal district court did in fact conclude that Tabler was mentally competent. The court only disregarded Tabler's attempted waiver because of the alleged threats to his life arising out of an incident that occurred *after* he waived his state postconviction appeals. Tabler's attorney's opinion that Tabler is incompetent and an undefined challenge to Dr. Harrison's evaluation do not approach the showing of clear and convincing evidence needed to rebut the state trial court's competency determination (and the Court of Criminal Appeals' affirmance). Tabler's state competency hearing and the resulting determination of competency did not deny him due process.

II. Tabler's Postconviction Counsel Were Not Constitutionally Ineffective and Tabler Waived Any Potential Claims of Ineffective Assistance of Trial Counsel

Tabler argues that he was denied the effective assistance of counsel in both his state and federal habeas proceedings and that his counsels' constitutionally-deficient performance qualifies as cause to excuse the procedural default of his ineffective-assistance-of-trial-counsel claims. To prevail on an ineffective-assistance-of-counsel-claim, a petitioner must

demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness" and that (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Tabler, through new counsel Widder, alleges that Schulman and Jasuta provided ineffective assistance at his state competency hearing by failing to challenge his competence, which in turn led to the waiver of his right to state habeas proceedings in which he could have raised claims of ineffective assistance of his state ***305** trial counsel. Because Schulman and Jasuta were also Tabler's federal habeas counsel, Tabler claims that they were further ineffective in his federal habeas proceeding because they faced an ethical conflict in raising claims about their own ineffectiveness in the state competency hearing.

Insofar as Tabler is alleging that ineffective assistance of his *habeas* counsel alone requires a remand to the district court to re-litigate his petition, he is mistaken. It is well-established that there is no federal constitutional right to counsel in postconviction proceedings. *Coleman v. Thompson,* 501 U.S. 722, 756–57, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Pennsylvania v. Finley,* 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). "Because a petitioner does not have a constitutional right to counsel in post-conviction habeas proceedings, it follows that a petitioner cannot claim ineffective assistance of counsel in such proceedings." *Irving v. Hargett,* 59 F.3d 23, 26 (5th Cir.1995).

In *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), the Supreme Court recognized a "narrow exception" to the general rule that there is no right to counsel in collateral proceedings, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* at 1315; *see also Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, 1921, 185 L.Ed.2d 1044 (2013) (*Martinez* applies to Texas state habeas proceedings). An attorney's error on direct appeal implicates the Sixth Amendment, and where an "initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Martinez,* 132 S.Ct. at 1317. But the Court was clear that the *Martinez* exception "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Id.* at 1320. Moreover, *Martinez* is an equitable rule, not a constitutional one, and does not provide defendants a freestanding constitutional claim to raise in a federal habeas petition. *Id.* at 1319.

To fall within the *Martinez* exception and avoid procedural default of any claim of ineffective assistance of trial counsel, Tabler must demonstrate (1) that his state habeas counsel were ineffective in an initial-review collateral proceeding, "where the claim should have been raised," and (2) "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318. Because Tabler waived his state postconviction rights, the only state habeas proceeding that occurred was the competency hearing. As Tabler could not have raised claims of ineffective assistance of trial counsel at that hearing, no "initial-review collateral proceeding"—as defined in *Martinez*—ever took place. The Supreme Court has not expressly extended the reasoning of *Martinez's* "narrow exception" to attorney errors that prevent an initial-review collateral proceeding from being held (and thus prevent a defendant from raising claims of ineffective assistance of trial counsel). But we need not resolve that question here. Even if ineffective assistance of state habeas counsel at a postconviction competency hearing provides cause for the procedural default of ineffective-assistance-of-trial-counsel claims, Tabler fails to demonstrate that the performance of his state habeas counsel ***306** and state trial counsel was constitutionally deficient.

To revive his ineffective-assistance-of-trial-counsel claims in federal court (assuming *Martinez* applies), Tabler must first show that his habeas counsels' performance at his competency hearing was ineffective under *Strickland.* But Schulman and Jasuta did not "abandon" Tabler at the hearing as he now claims. To the contrary, they followed his explicit instructions. "Neither the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence." *Wood v. Quarterman,* 491 F.3d 196, 203 (5th Cir.2007). The state trial court, the Court of Criminal Appeals, the federal district court, and both doctors appointed to evaluate Tabler found him mentally competent. It was completely reasonable for habeas counsel to conclude that Tabler was competent, as they subsequently represented to the district court, and to comply with his directive not to argue otherwise. *See* Va. Legal Ethics Op. No. 1737 (1999) (If a capital murder defendant is found competent by a psychiatrist and desires a sentence of death rather than life imprisonment, his attorney "is ethically bound to carry out the client's directive, even though such instruction is tantamount to a death wish.").[7]

Martinez does not provide a vehicle to set aside procedural default of any constitutional claim, but only preserves ineffective-assistance-of-trial-counsel challenges forfeited because of ineffective assistance of habeas counsel. Even if Tabler could show that his state habeas counsel were

ineffective, he has not made a "substantial showing" of his underlying claim of ineffective assistance of trial counsel required by *Martinez.* Tabler has merely listed potential errors in bullet point format. Holding that a list of hypothesized errors constitutes the requisite "substantial showing" of ineffective assistance at trial would transform *Martinez* from a "narrow exception" providing cause for procedural default into a virtual requirement of complete review of the state trial on federal habeas. We decline to do so.

Tabler also offers a corollary ineffective assistance argument predicated on his *statutory* right to counsel pursuant to 18 U.S.C. § 3599(a)(2). Citing recent Fourth Circuit jurisprudence, Tabler asserts that he was denied effective assistance in his federal habeas action because his state habeas counsel also served as his federal habeas counsel, and thus were necessarily impugned with an ethical conflict in identifying potential *Martinez* claims. The Fourth Circuit has held that "if a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under *Martinez* ..., qualified and independent counsel is *ethically required.*" *Juniper v. Davis,* 737 F.3d 288, 290 (4th Cir.2013). "This is because a clear conflict of interest exists in requiring petitioner's counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness ***307** of trial counsel while they represented petitioner in his state post-conviction proceedings." *Fowler v. Joyner,* 753 F.3d 446, 462 (4th Cir.2014) (internal quotation marks and alterations omitted).

Whatever the merits of the Fourth Circuit's rule, it is not applicable here. The purpose of appointing independent counsel is to *investigate* whether any potential *Martinez* claims exist. *Id.* at 463. Tabler was appointed independent counsel for his federal appeal who has had the opportunity to investigate and present these claims. *See id.* (denying motion for remand and appointment of independent counsel where independent counsel had already been provided). Moreover, the Fourth Circuit's rule was crafted for the typical *Martinez* scenario, where state habeas counsel's ineffectiveness is his failure to uncover ineffectiveness of trial counsel. What is really at issue here is whether Tabler was competent to waive his postconviction rights. Tabler is alleging that his habeas counsel were ineffective for failing to challenge his competency—not for failing to uncover ineffective assistance of trial counsel claims, which they never had the opportunity to do. Because Tabler's habeas counsel were not ineffective in his competency hearing, he cannot prevail on his *Martinez* claim even if he could otherwise make a substantial showing of ineffectiveness of trial counsel (which he does not). *See Martinez,* 132 S.Ct. at 1318 (to excuse procedural default of ineffective-assistance-of-trial-counsel

claims, prisoner must first show that his state habeas counsel was ineffective under *Strickland*).

III. The District Court's Denial of Tabler's Habeas Petition Without The Complete State Court Record Does Not Require Remand

Tabler argues that the district court's decision to deny his habeas petition is rendered unreliable because the court did not have the entire trial transcript when it made its rulings. Tabler requests that the entire case be remanded so the district court can revisit its rulings with the full trial transcript. But as this court has stated:

> There is nothing in the statute or in the Habeas Corpus Rules that requires a district court to review a state court record in its entirety. Indeed, federal courts do not sit as courts of appeal and error for state court convictions. Whether it is necessary to examine all of the state court proceedings is a decision left to the discretion of the district court judge. Here the district court was satisfied to make its decision upon a review of relevant portions of the state record. Dillard neither objected nor requested that additional transcripts be furnished, and no prejudice has been shown. We therefore hold that no error has been committed.

Dillard v. Blackburn, 780 F.2d 509, 513 (5th Cir.1986).

Tabler's attorneys supplemented his federal habeas petition with nearly 150 pages of exhibits and record excerpts, which the district court deemed sufficient to address the issues presented. All that is required is that the relevant portions of the record are available to the court. *See Magouirk v. Phillips,* 144 F.3d 348, 362 (5th Cir.1998) (“Regardless of how deferential the standard of review for state court fact findings ... we fail to see how any review at all can be conducted when the *relevant portions* of the state court record on remand are not available for review.” (emphasis added)). Ruling that a remand is required to allow review of materials deemed unnecessary by both the district court and Tabler himself would be tantamount to requiring district courts to review the entirety of the state court record ***308** before ruling on a habeas petition. This court has expressly rejected that requirement.

Additionally, Tabler is unable to show prejudice from the lack of a complete trial transcript. Ten of his fourteen claims for relief were unexhausted. Of the four exhausted claims, two of them—that executing the mentally ill and Texas's “10–2” rule are unconstitutional—are not fact-specific challenges that would be aided by a detailed examination of the record. Similarly, the issue of whether Tabler's trial counsel's alleged impermissible jury argument was procedurally barred may be adjudicated by simply reviewing

a transcript demonstrating trial counsel's failure to object. As to the final claim for relief that trial counsel's failure to object to the prosecution's closing argument constituted ineffective assistance of counsel, that is a legal question fully capable of resolution on a partial transcript.[8] The district court gave adequate consideration to Tabler's properly presented claims.

IV. Tabler's Trial Counsel Was Not Constitutionally Ineffective For Failing To Object To The Prosecution's Closing Argument

Tabler's final claim for relief is that his trial counsel was constitutionally ineffective for failing to object to the prosecution's argument that the jury should not consider Tabler's troubled childhood a mitigating circumstance because it was unconnected to his crimes of murdering four individuals outside of his family. Because the Court of Criminal Appeals rejected this claim on its merits, Tabler must not only establish that counsel was ineffective under *Strickland,* but also that the state court's determination that counsel was not constitutionally deficient was unreasonable. *See Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) ("The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly so.' " (internal citations omitted)).

Tabler maintains that the prosecutor's argument violated *Tennard v. Dretke,* 542 U.S. 274, 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), which invalidated the Fifth Circuit's requirement of a nexus between a defendant's crime and mitigating evidence presented during trial before a court may consider a defendant's *Penry* claim. A *Penry* claim, in turn, alleges a violation of the Eight Amendment where the jury is precluded from giving effect to mitigating evidence presented by the defendant. *See id.* at 278–79, 124 S.Ct. 2562 (describing *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) and *Penry v. Johnson,* 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001)).

As an initial matter, Tabler is not challenging his inability to bring a *Penry* claim and thus *Tennard* does not apply to his habeas petition. The Supreme Court has invalidated prosecutorial argument on the basis of the Eight Amendment only once where a death sentence was rendered "by a sentencer who ha [d] been led to believe ***309** that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi,* 472 U.S. 320, 328–29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). But "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright,* 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *see also Romano v. Oklahoma,*

512 U.S. 1, 8, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (*Caldwell* prohibits the prosecution from misleading the jury regarding the role it plays in the sentencing decision).

Even under the broadest interpretation of a *Penry* claim, Tabler does not fall within its purview. While the prosecution did state that mitigating evidence was irrelevant to the jury's sentencing determination, the jury was specifically instructed to "consider all evidence admitted at the guilt or innocence stage and the punishment stage, *including evidence of the defendant's background* or character or circumstances ... that militate[ ] against the imposition of the death penalty." *Compare Penry v. Lynaugh,* 492 U.S. 302, 326, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("In light of the prosecutor's argument, *and in the absence of appropriate jury instructions,* a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." (emphasis added)).

In any case, Tabler is not alleging a claim under the Eighth Amendment, but one under the Sixth. As the Court of Criminal Appeals and the district court found, there is nothing to establish that trial counsel's failure to object was not the exercise of legitimate trial strategy. With regard to the prejudice prong of the *Strickland* test, as just noted, the jury was instructed to consider evidence of Tabler's background and is presumed to have followed that instruction. *Weeks v. Angelone,* 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000). Considering the evidence presented at trial of Tabler's culpability; the expansive argument defense counsel made as to Tabler's "abnormality," which included testimony from three medical professionals as to Tabler's mental health, and in the case of Dr. Jacobvitz, focused specifically on the developmental effects of Tabler's childhood; defense counsel's own admonition to the jury that mitigating evidence did not have to be connected to Tabler's crimes; and the court's instruction that Tabler's background should be considered in the jury's sentencing decision, Tabler cannot show that it is reasonably likely that, but for the prosecution's misstatements, he would have received a sentence of life imprisonment instead of death. Accordingly, his ineffective-assistance-of-trial-counsel claim fails to approach the required showing of a denial of a constitutional right.

Conclusion

For the foregoing reasons, we DENY Tabler's petition for a COA.

JAMES L. DENNIS, Circuit Judge, dissenting:

This case presents difficult and interesting issues about how courts should address the requests of a death-sentenced defendant to first waive his rights, including his right to life itself, and then revoke the waiver. Reasonable minds could

differ on how best to address the troubling circumstances that have been presented in this case. However, I cannot agree with the majority's resolution here because it is not in accordance with law.

***310** Under *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), the state-court procedural default of certain challenges to a conviction or sentence may be excused, and those claims may be litigated in federal habeas proceedings (rather than precluded from consideration), if the habeas petitioner shows that the default stemmed from the ineffective assistance of the petitioner's state counsel. Therefore, under *Martinez* and *Trevino,* the effectiveness of state habeas counsel may be an important issue during federal habeas proceedings.

Here, however, when the federal district court appointed attorneys to represent Richard Lee Tabler during his federal habeas proceedings, *see* 18 U.S.C. § 3599(a)(2) (right to counsel), the court appointed the *same* attorneys who represented him in the state proceedings and whose representation there was arguably ineffective.[1] Because Tabler's federal attorneys also represented him in the state proceedings, they were conflicted from arguing in federal court that their assistance during the earlier state proceedings was inadequate. There can be no serious doubt that an attorney is conflicted from arguing that his own representation was ineffective. Therefore, Tabler's statutory right to counsel—*unconflicted* counsel—in the federal proceedings was denied. Indeed, the Fourth Circuit has recognized the conflict of interest in materially identical circumstances. *See Gray v. Pearson,* 526 Fed.Appx. 331, 334 (4th Cir.2013); *Juniper v. Davis,* 737 F.3d 288, 289 (4th Cir.2013). We should grant a certificate of appealability, vacate the district court's judgment, and remand for adjudication with unconflicted counsel. But the majority declines to do so and instead brushes aside the conflict of interest that deprived Tabler of his legal right to counsel, which is a right that the law does not allow us to ignore.

Moreover, in order to disregard Tabler's right to counsel, the majority renders judgment on the effectiveness of Tabler's state habeas attorneys. Those attorneys were, the majority concludes, effective. This is a stunning decision. Under *Martinez* and *Trevino,* the effectiveness of Tabler's state habeas attorneys was an important issue in federal court, and Tabler's federal attorneys were conflicted from litigating and *did not litigate* that issue. There has thus been no record development on the issue, and the majority has no basis but pure speculation to purport to decide that Tabler's state habeas attorneys afforded effective representation. *See Satterwhite v. Texas,* 486 U.S. 249, 256, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) ("Since the scope of a violation such as a deprivation of the right to conflict-free representation cannot be discerned from the record, any inquiry into its effect on

the outcome of the case would be purely ***311** speculative."). In essence, the majority concludes that we can violate Tabler's right to unconflicted counsel based on an assumption that unconflicted counsel would probably do him no good anyway. The law does not allow this sort of judgment "based on an assumption." *United States v. Herrera,* 412 F.3d 577, 582 (5th Cir.2005).

For the reasons hereinafter assigned, I respectfully dissent.

I.

On April 2, 2007, Tabler was sentenced to death in Texas state court.[2] Following his conviction, on April 24, the state court appointed attorneys David Schulman and John Jasuta to represent Tabler during his state habeas proceedings. *See* Tex.Crim. Proc.Code art. 11.071 § 1, 2 (right to appointment of counsel "for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death").

On August 11, 2008, Tabler, acting pro se although he was represented by counsel, sent a letter to the Texas Court of Criminal Appeals asking to waive his "rights to habeas corpus proceedings and volunteer for execution." The Court of Criminal Appeals forwarded the letter to the state trial court, which held a hearing on September 30, 2008 to address Tabler's competency to waive his state habeas rights.

Today, Tabler, who is no longer represented by Schulman and Jasuta and is now represented by a new attorney, Marcia Widder, contends, through the new attorney, that the competency-and-waiver hearing was flawed because it was non-adversarial in nature. That is, Tabler's attorneys then, Schulman and Jasuta, did not litigate Tabler's competency to waive his habeas rights nor did they seek to have the court appoint a representative for Tabler's interests who would litigate the issue. Tabler, through attorney Widder, further contends that, because Schulman and Jasuta had significant indicia of Tabler's unstable mental state—including that he had previously decided to drop all legal appeals only to change his mind later on numerous occasions—it was ineffective assistance of counsel for them to allow Tabler to waive his habeas rights without taking action to test his competency.[3] *See, e.g., Newman v. Norris,* No. 05–2107, 2008 WL 222689, at *8 (W.D.Ark. Jan. 24, 2008) ("The position that Petitioner was not competent to waive his rights to counsel and to seek post-conviction relief should have been advanced by an attorney, either a counsel of record or a 'next friend.' The court's failure to appoint such a representative resulted in an evidentiary hearing that failed to adequately develop all material facts and failed to ***312** afford Petitioner the process he was due, resulting in a hearing that was neither full nor fair."); *Appel v. Horn,* 250

F.3d 203, 215 (3d Cir.2001) ("[The attorneys] had the obligation to act as counsel at Appel's competency hearing by subjecting the state's evidence of competency to meaningful adversarial testing."). But Schulman and Jasuta took no such action, and, at the conclusion of the non-adversarial hearing, the state court declared Tabler's state habeas rights waived. On November 5, 2008, the state court issued an order dispensing with the habeas action.

Then Tabler changed his mind. On June 29, 2009, he wrote a letter to the state trial court requesting that his state habeas case be reinstated. Schulman and Jasuta, acting as Tabler's counsel, filed a motion with the Court of Criminal Appeals to continue the representation and to file a state habeas petition on Tabler's behalf. The court denied the motion because, it said, the record "demonstrates that [Tabler] made a knowing and voluntary choice to waive habeas review."

On February 12, 2010, Tabler's federal habeas proceedings in district court began with an application for stay of execution and motion for appointment of counsel. Both were filed by Schulman and Jasuta, on Tabler's behalf. On February 25, the district court appointed Schulman and Jasuta as Tabler's federal habeas counsel. *See* 18 U.S.C. § 3599(a)(2) (right to counsel in federal habeas proceedings "seeking to vacate or set aside a death sentence"). On November 13, 2011, Schulman and Jasuta filed Tabler's federal habeas petition. The district court dismissed the petition in full on February 9, 2012.

On March 20, 2012, the Supreme Court decided *Martinez v. Ryan,* ——U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). In *Martinez,* the Court held generally that the state-court procedural default of certain challenges to a conviction or sentence (specifically, ineffective-assistance-of-trial-counsel claims under the Sixth Amendment) may be excused, and those claims may be litigated in federal habeas proceedings (rather than precluded from consideration), if the habeas petitioner shows that the default stemmed from the ineffective assistance of his state habeas counsel. *Id.* at 1320 ("Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.").

As a result of *Martinez,* the effectiveness of state habeas counsel became a significant issue in federal habeas proceedings. Thus, Schulman and Jasuta, who served as Tabler's state habeas counsel, realized that they should no longer serve as his federal counsel, as they have an obvious conflict of interest against arguing that their work in the state court was ineffective. On March 29, 2012, Schulman and

Jasuta moved in the district court to withdraw as Tabler's attorneys and for the appointment of new counsel, explaining:

> *Martinez* may require the appointment of different counsel in federal habeas proceedings than those who represented the applicant in state habeas corpus proceedings. It provides a legal avenue for new habeas counsel to pursue procedurally defaulted claims in federal court by arguing that state habeas counsel were ineffective. Applicant is entitled to such counsel.

On April 4, 2012, the district court denied the motion. The court explained that it was "persuaded that no attorneys could have proceeded, or could proceed, any ***313** more effectively than the attorneys currently on this case."

On April 26, 2012, Widder appeared in the district court and moved to substitute herself for Schulman and Jasuta as Tabler's federal habeas counsel. The following day, Schulman and Jasuta moved again to withdraw as counsel and for the appointment of new counsel, specifically, Widder. Again, they explained that a "legal conflict" "prevent[ed] them from proceeding." They were "not," they explained, "in a position to litigate any claims pursuant to the effect of the Supreme Court's recent decision in *Martinez*." On May 1, 2012, the district court granted the motions, allowing Widder to substitute for Schulman and Jasuta as Tabler's federal counsel. The next day, Tabler, through attorney Widder, filed his notice of appeal.

While Tabler's appeal was pending, on May 28, 2013, the Supreme Court decided *Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). Overturning precedent from this court to the contrary, the Court held in *Trevino* that the rule of *Martinez* applies in Texas. *Id.* at 1921; *see also Ibarra v. Thaler,* 687 F.3d 222, 227 (5th Cir.2012), *overruled by Trevino,* 133 S.Ct. at 1916, 1921.

This court called for supplemental briefing on the effect of *Trevino.* Tabler, through attorney Widder, now contends that the conflict of interest Schulman and Jasuta faced as a result of *Martinez* and *Trevino* deprived Tabler of his statutory right to counsel. Tabler, through Widder, asks this court to grant the requested certificate of appealability, vacate the district court's judgment, and remand to the district court for adjudication, with unconflicted counsel, of whether Schulman and Jasuta's representation during the competency-and-waiver hearing, which led to Tabler asserting no state habeas claims, was ineffective and resulted in the default of any substantial ineffective-assistance-of-trial-counsel claims.

II.

As a habeas petitioner challenging his death sentence, Tabler has a statutory right to counsel in the federal habeas proceedings. *See* 18 U.S.C. § 3599(a)(2) (right to counsel in federal habeas proceedings "seeking to vacate or set aside a death sentence").[4] The statutory right to counsel encompasses a right to counsel who are not precluded from effective representation because of a conflict of interest. *See Martel v. Clair,* ——U.S. ——, 132 S.Ct. 1276, 1286, 182 L.Ed.2d 135 (2012) (under § 3599, courts "have to ensure that the defendant's statutory right to counsel was satisfied throughout the litigation," and, "if the first lawyer developed a conflict," "the court would have to appoint new counsel"); *Johnson v. Gibson,* 169 F.3d 1239, 1254 (10th Cir.1999) (a conflict of interest is "good cause" to substitute counsel under prior version of § 3599 previously codified at 21 U.S.C. § 848(q)); *Jeffers v. Lewis,* 68 F.3d 295, 298 (9th Cir.) (the right to counsel under § 848(q) "encompasses a requirement of counsel who are not disabled by conflict of interest"), *vacated en banc on other grounds,* 68 F.3d 299 (9th Cir.1995); *accord Hanna v. Bagley,* No. 1:03–CV–801, 2014 WL 1342985, at *5 (S.D.Ohio Apr. 3, 2014) (substituting counsel under § 3599 to avoid risk of conflict).

A significant conflict of interest arises if an attorney must argue that his own representation at an earlier stage of the litigation ***314** was ineffective. *See Maples v. Thomas,* —— U.S. ——, 132 S.Ct. 912, 925 n. 8, 181 L.Ed.2d 807 (2012) (a "significant conflict of interest arose" when the circumstances were such that the law firm's "strongest argument" on behalf of the firm's client was that the firm had earlier abandoned the client); *United States v. Del Muro,* 87 F.3d 1078, 1080 (9th Cir.1996) ("Del Muro argues on appeal that the district court created an inherent conflict of interest by forcing trial counsel to prove his own ineffectiveness.... We agree."); *Holmes v. Norris,* 32 F.3d 1240, 1240–41 (8th Cir.) ("One could hardly expect that lawyer to argue his own ineffectiveness with any degree of conviction or persuasiveness. To make such an argument places a lawyer in the sharpest sort of conflict of interest."), *summarily vacated en banc,* 32 F.3d 1240 (8th Cir.1994); *Abbamonte v. United States,* 160 F.3d 922, 925 (2d Cir.1998) (observing that attorneys are "not inclined to seek out and assert [their] own prior ineffectiveness"); *Sasser v. Hobbs,* 735 F.3d 833, 852 (8th Cir.2013) (similar).

Accordingly, one of our sister circuits and several district courts have recognized the logical conclusion that, in federal habeas proceedings, attorneys are conflicted from arguing their own ineffectiveness in the earlier state habeas proceedings, which *Martinez* and *Trevino* now call for. *Gray v. Pearson,* 526 Fed.Appx. 331, 334 (4th Cir.2013) ("We find that a clear conflict of interest exists in requiring Gray's counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented Gray in his state post-conviction proceedings.");

737 F.3d 288, 290 (4th Cir.2013) ("[A]s in *Gray,* we find it ethically untenable to require [federal habeas] counsel to assert claims of his or her own ineffectiveness in the state habeas proceedings in order to adequately present defaulted ineffective-assistance-of-trial-counsel claims under *Martinez* in the federal habeas proceedings."); *Huebler v. Vare,* No. 3:05–CV–48, 2014 WL 1494271, at *2–3 (D.Nev. April 15, 2014) ("Following *Martinez,* current counsel thus is placed in a position of having to review the performance of a state post-conviction litigation team on which she worked—including as an attorney—to determine whether the team inadequately failed to raise additional claims.... Current counsel is under an obligation under Martinez to conduct such review, and she has a conflict of interest when doing so. That conflict of interest is real, actual and current.") (quoting *Bergna v. Benedetti,* No. 3:10–CV–389, 2013 WL 3491276, at *2 (D.Nev. July 9, 2013)); *accord Farnum v. Legrand,* No. 2:13–CV–1304, 2013 WL 5817033, at *3 (D.Nev. Oct. 9, 2013); *Ferguson v. Allen,* No. 3:09–CV–138, 2014 WL 3689784, at *13 n. 15 (N.D.Ala. July 21, 2014).

In *Gray,* the Fourth Circuit addressed materially identical circumstances as presented here. There, following the petitioner's state habeas proceedings, the petitioner filed federal habeas proceedings, and "[t]he district court appointed the same attorneys who had represented Gray in the state habeas proceedings to represent him in his federal habeas proceedings." 526 Fed.Appx. at 332. As here, the petitioner in *Gray* contended on appeal that, as a result of *Martinez* (which, as here, was decided during the pendency of the case), he was denied his right to "the appointment of independent [*i.e.,* unconflicted] counsel in his federal habeas proceeding." *Id.* In other words,

> Gray argues, in essence, that because he has been represented by the same counsel in both state and federal post-conviction proceedings, he is unable to identify any potential *Martinez* claims and to ***315** rely thereon to assert "cause" to excuse any such otherwise procedurally defaulted claims because in order to do so his current counsel would be required to argue their *own* ineffectiveness in their representation of him in state post-conviction proceedings. Gray maintains that such a task would create a conflict of interest that contravenes his counsels' professional ethical duties and thereby corrode their duty of vigorous representation.

Id. at 334. The Fourth Circuit "agree[d]" that a "clear conflict of interest" existed. *Id.* at 332, 334.

Further, the Fourth Circuit rejected the state's argument that the conflict of interest should be disregarded because Gray had, on appeal, failed to identify any "sufficiently substantial" ineffective-assistance-of-trial-counsel claims (referred to by the court as "*Martinez* claims"):

> The fact, even if true, that Gray's counsel did not identify any "sufficient [ly] substantial" claim under *Martinez* does not undercut their request that independent counsel be appointed to explore Gray's *Martinez* claims. We see no material difference between an ethical prohibition on a lawyer's attempt to *investigate or advance* her own potential errors, on the one hand, and a like prohibition on her attempts to *identify and produce a list* of her own errors giving rise to a "substantial claim" on the other hand.

Id. at 334–35 (quotation marks, italics, and alteration in original). Accordingly, the Fourth Circuit vacated the district court's judgment and remanded to the district court for further proceedings with unconflicted counsel. *Id.* at 335. (The Fourth Circuit later adopted Gray's reasoning in a published opinion. *See Juniper,* 737 F.3d at 289.)

Tabler's case is identical. Here, as a result of *Martinez* and *Trevino,* Schulman and Jasuta, Tabler's attorneys, had a conflict of interest that precluded them from effectively representing Tabler in his federal habeas proceedings. In federal court, the only way for Tabler to claim ineffective representation at trial was to first show that his state habeas counsel, who allowed him to waive state habeas proceedings without an adversarial process to test his competency to do so, acted ineffectively in doing so. *See Martinez,* 132 S.Ct. at 1320. Schulman and Jasuta were Tabler's attorneys in both his initial state habeas proceedings and his later federal habeas proceedings. In the federal proceedings, they were conflicted from arguing that they were ineffective in the earlier state proceedings.

In short, Tabler had a statutory right to counsel in his federal habeas proceedings, and that right was violated when the district court appointed counsel that were conflicted from litigating their own ineffectiveness in the state habeas proceedings (which was necessary to assert ineffective-assistance-of-trial-counsel claims on Tabler's behalf). This court should grant a certificate of appealability, vacate the district court's judgment, and remand to the district court so that Tabler, with unconflicted counsel (such as his current attorney, Widder), may have an opportunity to litigate state habeas counsels' alleged ineffectiveness. *Cf. Mixon v. United States,* 620 F.2d 486, 487 (5th Cir.1980) (vacating and remanding district court's judgment because the magistrate judge had conflict of interest and, thus, "we treat the proceedings and the disposition below as a nullity").

III.

For the reasons I have explained, the effectiveness of Tabler's state habeas attorneys ***316** (Schulman and Jasuta) is an important issue in this case, and Tabler's federal habeas attorneys (again, Schulman and Jasuta) were conflicted and

unable to litigate that issue because it would require them to press their own ineffectiveness as attorneys. Nevertheless, the majority believes that we can ignore the conflict of interest that precluded Tabler's attorneys from litigating their effectiveness because the attorneys *were,* the majority decides, effective. *Ante,* at 305 ("Tabler fails to demonstrate that the performance of his state habeas counsel was constitutionally deficient."); *id.* at 307 ("Tabler's habeas counsel were not ineffective...."). The majority's decision to render judgment on the effectiveness of Tabler's attorneys is stunning. That issue has never been litigated. Evidence has never been gathered, a record has never been developed, and legal arguments have never been presented to the state courts, the federal district court, or this court. The majority's conclusion that Tabler's counsel were effective is utter speculation.

The precise issue is whether it was ineffective representation for Schulman and Jasuta during the state habeas proceedings to allow Tabler to waive his habeas rights without taking action to test his competency to do so. There are some indications in the record that Schulman and Jasuta ought to have been skeptical of Tabler's competency to make the waiver, namely, that on several prior occasions, Tabler had sought to waive his rights and volunteer for execution and then changed his mind. Indeed, after the state court accepted Tabler's waiver, Schulman and Jasuta would later come to believe that Tabler "suffers from serious mental disabilities" and "is not competent and able to make a knowing, voluntary, and intelligent waiver"—but, at that point, it was too late. *See supra,* note 3. Under *Martinez* and *Trevino,* Tabler's federal habeas attorneys should have sought to prove that the representation of the state habeas attorneys was ineffective, but that never happened here because the attorneys were conflicted from doing so. There has been no litigation, and we have no record, as to whether Tabler's state habeas attorneys provided effective representation.

It is obvious that this court cannot decide a claim of ineffective assistance of counsel on an assumption rather than actual evidence. Although that principle should require no citation, it nevertheless has ample support. *E.g., United States v. Hayes,* 532 F.3d 349, 355 (5th Cir.2008) ("Because the district court did not hold an evidentiary hearing, we would be engaging in speculation, preventing adequate review of the district court's judgment as to whether defense counsel performed unreasonably under *Strickland*."); *United States v. Culverhouse,* 507 F.3d 888, 898 (5th Cir.2007) ("Without any evidence as to counsel's strategy, we refuse to make hindsight guesses on the matter."); *United States v. Herrera,* 412 F.3d 577, 582 (5th Cir.2005) ("Rather than decide the question based on an assumption, the better approach is to have the district court conduct an evidentiary hearing."); *United States v. Bramlett,* 191 Fed.Appx. 271, 272 (5th Cir.2006) ("Resolution of Bramlett's ineffective assistance of counsel claim turns on a factual issue, namely,

whether his trial counsel informed him of the statutory maximum sentence. The district court has made no factual findings with regard to this issue. This court should not make that factual assessment in the first instance."). Despite this precedent, the majority purports to do what the law does not allow: it renders judgment on the effectiveness of Tabler's state habeas attorneys, an issue for which we have no record, based on utter speculation.

***317** When, as here, a litigant has the right to an attorney, the problem with that attorney having a conflict of interest is that it undermines or defeats the adversary process upon which our judicial system is premised. Courts decide cases based on records amassed and presented by adverse parties. If one side's performance was hampered by a conflict of interest, the court is left with a record that is inadequate for rendering decision in accordance with the usual adversarial process. *See Satterwhite v. Texas,* 486 U.S. 249, 256, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) ("Since the scope of a violation such as a deprivation of the right to conflict-free representation cannot be discerned from the record, any inquiry into its effect on the outcome of the case would be purely speculative."); *United States v. Segarra–Rivera,* 473 F.3d 381, 384 (1st Cir.2007) (explaining that the issue of an attorney conflict was "logically antecedent" to the substantive question the district court faced because, if the attorney was conflicted, "it would cast doubt upon the validity of the record on which the district court ruled"). The majority's approach here turns the adversary system on its head. Tabler's federal habeas attorneys were conflicted from litigating the ineffectiveness of Tabler's state habeas attorneys, and they *did not litigate* that issue. This court cannot ignore the conflict for the reason that, from our vantage point, the representation of Tabler's state habeas attorneys appears to have been fine. We have no record upon which to decide that, and we cannot, in accordance with due process, "decide the question based on an assumption." *Herrera,* 412 F.3d at 582. The majority's approach, which decides unlitigated claims on assumptions about their merits in order to affirm the lack of adversarial litigation, "puts the cart before the horse." *Segarra–Rivera,* 473 F.3d at 384. The law requires that Tabler have the assistance of *unconflicted* counsel to press his legal claims. *See* 18 U.S.C. § 3599(a)(2). Only *after* those claims are asserted *by Tabler's counsel,* as is his right, may this court decide the merits of those claims.[5]

IV.

This court may bristle at the prospect of delaying execution of the state court's judgment of death while Tabler proceeds through a second round of federal habeas proceedings. But it is this court's duty to apply the law, not abstract principles of fairness or policy. Congress has provided Tabler with the right to an attorney in his federal habeas proceedings, and that right ***318** was violated when Tabler was afforded

counsel who were conflicted from effective representation. Contrary to the majority's conclusion, we cannot ignore that legal error. I respectfully dissent.

All Citations

588 Fed.Appx. 297

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

1 Although the Court of Criminal Appeals rejected six of Tabler's challenges, Tabler raised only four of those claims in his federal habeas petition. The other two claims—a challenge to the jury instructions and the admissibility of Tabler's confessions—were neither raised as independent grounds of relief nor adequately briefed. Accordingly, those claims were waived.

2 Tabler's further assertion that the adequacy of the state competency hearing was raised in the district court because that court relied on the validity of the waiver in denying Tabler's request to stay his federal habeas proceedings lacks merit. Vague references to the sufficiency of the state court's findings are inadequate to have preserved the issue for appeal.

3 *Mata* involved review of a federal district court hearing to determine the competency of a defendant seeking to waive his federal habeas rights. Because the standard is a constitutional one, this court has applied the *Mata* test in reviewing an analog state hearing. *See Murray v. Quarterman,* 243 Fed.Appx. 51, 53–54 (5th Cir.2007).

4 Tabler's own citations, which focus on a state court's denial of the opportunity to present evidence of incompetence, demonstrate this basic proposition. *See Ford v. Wainwright,* 477 U.S. 399, 412–14, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ("Any *procedure* that *precludes* the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate." (emphasis added)).

5 Tabler also argues that the trial court misled him regarding the timeline for filing his state habeas petition by suggesting that his petition for habeas corpus would not be due until after the Court of Criminal Appeals ruled on his direct appeal. Even were this true, such an error would be harmless. Tabler was not only represented by counsel who would know the correct timeframe for filing the petition, but Tabler was also *waiving that right.* Because he was forfeiting his right to pursue collateral relief, it is irrelevant that the court provided ambiguous information as to the filing deadline. Tabler does not assert that the court misled him regarding the substance of his habeas rights (which it did not).

6 A defendant's competency to waive habeas proceedings is determined by whether "he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton,* 384 U.S. 312, 314, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966). The capacity for "rational choice" in this context is equivalent to the capacity for "rational understanding" in determining a defendant's competency to stand trial. *Godinez v. Moran,* 509 U.S. 389, 398 n. 9, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); *see also Rumbaugh v. Procunier,* 753 F.2d 395, 398–99 (5th Cir.1985) (describing three-part test for determining whether a defendant is competent to waive postconviction relief).

7 It is also doubtful that Tabler could establish prejudice. The same judge that presided over Tabler's competency hearing presided over his trial, and thus would have already heard much of the evidence regarding Tabler's mental health, including testimony from four mental health professionals during the punishment phase. *See Dennis ex rel. Butko v. Budge,* 378 F.3d 880, 894 (9th Cir.2004) ("[J]udges who have an opportunity to observe and question a prisoner are often in the best position to judge competency, especially ... where the judge has had more than one

opportunity to observe and interact with the prisoner.").

[8] Tabler also suggests that the district court could not validly uphold the state court's waiver hearing without the benefit of the mental health testimony presented at his trial. This contention is puzzling for the reason that, as already noted, the adequacy of the competency hearing was not presented to the district court (indeed, that is the very basis for Tabler's unavailing argument that independent counsel should have been appointed at the federal level). Accordingly, the district court had no need for this information. In any case, for the reasons now exhaustively discussed, there is no question that Tabler's competency hearing and the factual determination of competence itself satisfied due process.

[1] It is argued that their representation during the state proceedings was ineffective because they disregarded indicia of Tabler's troubled mental state and allowed him to waive his right to state habeas proceedings without testing his competency to waive such rights. *See, e.g., Newman v. Norris,* No. 05–2107, 2008 WL 222689, at *8 (W.D.Ark. Jan. 24, 2008) ("The position that Petitioner was not competent to waive his rights to counsel and to seek post-conviction relief should have been advanced by an attorney, either a counsel of record or a 'next friend.' The court's failure to appoint such a representative resulted in an evidentiary hearing that failed to adequately develop all material facts and failed to afford Petitioner the process he was due, resulting in a hearing that was neither full nor fair."); *Appel v. Horn,* 250 F.3d 203, 215 (3d Cir.2001) ("[The attorneys] had the obligation to act as counsel at Appel's competency hearing by subjecting the state's evidence of competency to meaningful adversarial testing.").

[2] On December 16, 2009, the Texas Court of Criminal Appeals affirmed the conviction and death sentence. *Tabler v. State,* No. AP–75,677, 2009 WL 4931882 (Tex.Crim.App. Dec. 16, 2009) (unpublished).

[3] After the September 30, 2008, competency-and-waiver hearing, Tabler sent a letter to the United States Supreme Court seeking to have the Court dismiss the pending petition for writ of certiorari regarding his direct appeal to the Texas Court of Criminal Appeals. On June 15, 2010, attorneys Schulman and Jasuta, along with Tabler's direct appeal attorney, filed a statement in the Supreme Court stating, *inter alia,* that Tabler "suffers from serious mental disabilities" and "is not competent and able to make a knowing, voluntary and intelligent waiver." The attorneys further stated that Tabler "has decided and determined to drop all appeals on at least five previous occasions over the last three years," and "[i]n each instance ... would subsequently change his mind." At least two of those instances occurred *before* the September 30, 2008, hearing.

[4] Attorneys Schulman and Jasuta were appointed by the district court as Tabler's habeas attorneys under § 3599(a)(2).

[5] The majority seems to suggest that we can render judgment on Tabler's unlitigated claim of ineffective assistance because Tabler was appointed a new, unconflicted attorney on appeal (that is, to request a certificate of appealability from this court), and *that* attorney could have theoretically researched outside the record to prepare attorney-ineffectiveness claims for assertion in this appellate court that were not previously asserted in the district court. *See ante,* at 307 ("Tabler was appointed independent counsel for his federal appeal who has had the opportunity to investigate and present these claims."). This, again, is clear error. "The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations." *United States v. Higdon,* 832 F.2d 312, 313–14 (5th Cir.1987). We cannot fault Tabler's appellate attorney for failing to assert attorney-ineffectiveness claims on appeal that were not previously asserted in the district court when our precedent does not allow such, as this court has said time and again. *See, e.g., United States v. London,* 568 F.3d 553, 562 (5th Cir.2009); *United States v. Brewster,* 137 F.3d 853, 859 (5th Cir.1998); *United States v. Thomas,* 12 F.3d 1350, 1368 (5th Cir.1994); *United States v. Owen,* 418 Fed.Appx. 285, 287 (5th Cir.2011).

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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

Richard Lee TABLER, Petitioner–Appellant
v.
William STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent–Appellee.

No. 12–70013.
|
Jan. 27, 2015.

Attorneys and Law Firms

Marcia Adele Widder, Atlanta, GA, for Petitioner–Appellant.

Fredericka Searle Sargent, Assistant Attorney General, Office of the Attorney General, Austin, TX, for Respondent–Appellee.

Appeal from the United States District Court for the Western District of Texas. USDC 6:10–CV–34.

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

Opinion

PER CURIAM:*

In light of the Supreme Court's decision in *Christeson v. Roper,* 574 U.S. ——, 135 S.Ct. 891, —— L.Ed.2d ——, 2015 WL 232187 (2015) (per curiam), we VACATE IN PART our previous opinion denying Richard Tabler's petition for a Certificate of Appealability, *Tabler v. Stephens,* 2014 WL 4954294 (5th Cir.2014) (unpublished). We now hold that the equitable rule established in *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 1315, 182 L.Ed.2d 272 (2012), that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," logically extends to ineffective assistance of habeas counsel that prevents an initial-review collateral proceeding from ever taking place. Because Tabler's attorneys for his state habeas proceedings were also his attorneys for his federal habeas proceedings, they faced a conflict of interest that could have prevented them from arguing that their performance in Tabler's competency hearing was deficient, and, accordingly, Tabler's statutory right to counsel was violated. *See Christeson,* 574 U.S. at ——, 135 S.Ct. at ——. We hereby VACATE IN PART the district court's judgment and REMAND the case to the district court solely to consider in the first instance whether Tabler, represented by his new counsel Widder or other unconflicted counsel, can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief.

All Citations

591 Fed.Appx. 281 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

RICHARD LEE TABLER,	§	
TDCJ # 00999523,	§	
Petitioner,	§	
	§	
v.	§	**CIVIL ACTION NO. W-10-CA-034**
	§	
RICK THALER, Director, Texas	§	
Department of Criminal Justice,	§	
Institutional Division,	§	
Respondent.	§	

ORDER

On August 17, 2011, the Court held a hearing to determine whether Petitioner Richard Lee Tabler was competent to make the decision to abandon all appeals and post-conviction remedies. After considering the testimony of Dr. Roger D. Saunders and his report, as well as the statements of Petitioner and his attorneys, the Court determined that Petitioner's decision was not voluntary.

PROCEDURAL HISTORY

Tabler was convicted of capital murder and sentenced to death. His conviction was affirmed on direct appeal. *Tabler v. State of Texas*, 2009 WL 4931882, No. AP-75,677 (Tex.Crim.App. Dec. 16, 2009)(unpublished). His petition for a *writ of certiorari* was denied. *Tabler v. State of Texas*, No. 09-9654 (Oct. 4, 2010). There are no proceedings pending other than this case.

The present matter was filed as a request for appointment of counsel and for a stay of execution while Petitioner exhausted his state-court remedies. The request for appointment of counsel was granted on February 25, 2010 under 18 U.S.C. § 3599(a)(2), as was the requested stay of execution. Because no habeas application has been filed, there is no record before the Court other than what is available through public records and has been filed as attachments to the various motions and briefs.

While Petitioner's mandatory state direct appeal was pending, counsel was appointed to represent him in filing a state habeas corpus application. However, no timely application was filed because Petitioner requested in the trial court that all appeals and post-conviction remedies be dropped. After Petitioner made this request, the trial court held a hearing on September 30, 2008 and issued an order on November 5, 2008 granting Petitioner's request. On June 29, 2009, Petitioner changed his mind and requested that the trial court reinstate his "appeal." Petitioner's attorneys argued that Petitioner was unable to make sound informed decisions. The Court of Criminal Appeals disagreed after reviewing the state court opinion and denied the motion to reinstate the appeal. *Ex Parte Richard Tabler*, No. WR-72,350-01 (Tex.Crim.App. Sept. 16, 2009). The next occurrence was the denial of Petitioner's direct appeal on December 16, 2009.

Petitioner's attorneys then initiated this action. On June 2, 2010, Petitioner sent a letter to this Court which indicated that his attorneys had filed the requested

stay without his approval. Petitioner noted in his letter that he had already waived his appellate and post-conviction rights in the state court and requested that a new execution date be set. Petitioner's request was forwarded to the Supreme Court, where his petition for writ of certiorari was pending.

In a supplemental filing in the Supreme Court, Petitioner's attorneys noted:

> Petitioner suffers from serious mental disabilities, including bipolar disorder, and at this time is not competent and able to make a knowing, voluntary and intelligent waiver of his rights to appeal. Petitioner demonstrates a deep and severe constellation of mental illnesses described on Axis F of the Diagnostic and Statistical Manual of Mental Disorders ("DSM") IV. These have been disabling and debilitating for him since at least early adolescence, and have never been adequately managed from a medical or psychological standpoint.

Unified Statement of Counsel for Petitioner ("Counsel Statement"), pp. 2-3. His attorneys followed with a "statement" that Tabler's actions were "not the product of a voluntary and rational decision." Despite the supplemental brief, the petition for *writ of certiorari* was denied on October 4, 2010.

Since his petition for writ of certiorari was denied, Petitioner sent a number of letters to this Court and the trial court requesting that his attorneys be fired and an execution date set. Because of the allegations of Petitioner's attorneys and the contents of Petitioner's correspondence, a bona fide doubt as to Petitioner's competence was raised. The Court, therefore, appointed Dr. Richard D. Saunders to conduct a mental health evaluation of Petitioner. Dr. Saunders' report was filed with the Court on July 26, 2011.

LEGAL ANALYSIS

In determining whether a defendant is mentally competent to waive his right to file appeals or collateral attacks upon his conviction and sentence, the question is whether he "has a capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S. 312, 314 (1966). The Fifth Circuit has created a three-part test to determine whether a defendant can competently waive his appellate rights. *See Rumbaugh v. Procunier*, 753 F.2d 395, 396 (5th Cir. 1985). The district court should determine the following:

> (1) whether [the petitioner] suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents [the petitioner] from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents that person from making a rational choice among his options.

Mata v. Johnson, 210 F.3d 324, 328 (5th Cir. 2000).

The determination of competency is essentially a fact issue. *Rumbaugh*, 753 F.2d at 399. While a suicide attempt, in and of itself, is not necessarily sufficient to create "reasonable cause" for a competency hearing, but it is evidence that "must be weighed in conjunction with all other evidence presented with respect to a [petitioner's] mental stability and competence." *Id.*, at 330.

After reviewing the entire record, as well as the testimony and statements of Petitioner, Petitioner's attorneys, Dr. Saunders and Respondent's attorneys, the

Court has determined that Petitioner is not presently suffering from a mental disease, disorder or defect which prevents him from understanding his legal position and the options available to him or which prevents him from making a rational choice among his options.

However, there are forces acting upon Petitioner which prevent his waiver from being a voluntary choice. In evaluating the waiver of a fundamental constitutional right, the reviewing court should "indulge every reasonable presumption against waiver." *Mata v. Johnson*, 210 F.3d at 329, *citing Hodges v. Easton*, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169 (1882). A valid and effective waiver is one that is made intentionally and *voluntarily*. *Id.*, *citing Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.1461 (1938) and *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (emphasis added). Accordingly, it is

ORDERED that the Unopposed Motion for Administrative Reinstatement (document # 11) is **GRANTED**, and this case is reopened so that Petitioner may file an application for habeas corpus relief under 28 U.S.C. § 2254.

SIGNED this 18 day of August, 2011.

WALTER S. SMITH, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

RICHARD LEE TABLER,	§	
TDCJ # 00999523,	§	
Petitioner,	§	
	§	
v.	§	**CIVIL ACTION NO. W-10-CA-034**
	§	
RICK THALER, Director, Texas	§	
Department of Criminal Justice,	§	
Institutional Division,	§	
Respondent.	§	

ORDER

Petitioner was convicted of capital murder and he seeks to have his conviction and sentence vacated. Having reviewed the parties' briefs, the record in this case, and the applicable legal authority, the Court is persuaded Petitioner's request for habeas relief should be denied.

I. PROCEDURAL HISTORY

Tabler was convicted of capital murder and sentenced to death. His conviction was affirmed on direct appeal. *Tabler v. State of Texas*, 2009 WL 4931882, No. AP-75,677 (Tex.Crim.App. Dec. 16, 2009)(unpublished). His petition for a *writ of certiorari* was denied. *Tabler v. State of Texas*, No. 09-9654 (Oct. 4, 2010). The present matter was filed as a request for appointment of counsel and for a stay of execution pursuant to 28 U.S.C. §§ 2261 and 2262 and 18 U.S.C. § 3599(a)(2) while Petitioner exhausted his state-court remedies. The request for

appointment of counsel was granted on February 25, 2010, as was the requested stay of execution.

While Petitioner's mandatory state direct appeal was pending, counsel was appointed by the state court to represent him in filing a state habeas corpus application. However, no timely application was filed because Petitioner requested in the trial court that all appeals and post-conviction remedies be dropped. After Petitioner made this request, the trial court held a hearing on September 30, 2008 and issued an order on November 5, 2008 granting Petitioner's request. On June 29, 2009, Petitioner changed his mind and requested that the trial court reinstate his "appeal." Petitioner's attorneys argued that Petitioner was unable to make sound informed decisions. The Court of Criminal Appeals disagreed after reviewing the state court opinion and denied the motion to reinstate the appeal. *Ex Parte Richard Tabler*, No. WR-72,350-01 (Tex.Crim.App. Sept. 16, 2009). The next occurrence was the denial of Petitioner's direct appeal on December 16, 2009.

Petitioner's attorneys then initiated this action. On June 2, 2010, Petitioner sent a letter to this Court which indicated that his attorneys had filed the requested stay without his approval. Petitioner noted in his letter that he had already waived his appellate and post-conviction rights in the state court and requested that a new execution date be set. Petitioner's request was forwarded to the Supreme Court, where his petition for writ of certiorari was pending.

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> Petitioner suffers from serious mental disabilities, including bipolar disorder, and at this time is not competent and able to make a knowing, voluntary and intelligent waiver of his rights to appeal. Petitioner demonstrates a deep and severe constellation of mental illnesses described on Axis F of the Diagnostic and Statistical Manual of Mental Disorders ("DSM") IV. These have been disabling and debilitating for him since at least early adolescence, and have never been adequately managed from a medical or psychological standpoint.

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Petitioner then sent a number of letters to this Court and the trial court requesting that his attorneys be fired and an execution date set. Because of the allegations of Petitioner's attorneys and the contents of Petitioner's correspondence, a bona fide doubt as to Petitioner's competence was raised. The Court, therefore, appointed Dr. Richard D. Saunders to conduct a mental health evaluation of Petitioner. Dr. Saunders' report was filed with the Court on July 26, 2011, and a hearing was held on August 17, 2011. After hearing the testimony of Petitioner, the Court determined that Petitioner was mentally competent but that his decision to forsake his post-conviction remedies was not voluntary. Document 33 and Sealed Document 34. The parties were then given a schedule for filing briefs.

The Court now has before it Petitioner's Application for Post-Conviction Writ of Habeas Corpus and Respondent's Answer and Motion for Summary Judgment.

Petitioner was directed to file a response to Respondent's motion by January 13, 2012. Petitioner has not responded as directed.

II. FACTS OF UNDERLYING OFFENSE

The statement of facts from the Texas Court of Criminal Appeals opinion affirming Petitioner's conviction consists of the following:

> Mohamed-Amine Rahmouni managed a topless bar called Teazers, where [Tabler] worked until he and Rahmouni had a conflict. Rahmouni allegedly told [Tabler] that he could have [Tabler's] family wiped out for ten dollars.
>
> [Tabler] decided on November 18, 2004, that he would kill Rahmouni after Thanksgiving. In preparation for killing Rahmouni, [Tabler] borrowed a 9-millimeter gun, a camcorder, and a pickup truck. Then, on the night of November 25, 2004, which was Thanksgiving Day, [Tabler] called Rahmouni with an offer to sell him cheap stereo equipment and told him they would meet in the parking lot of a local business. Haitham Zayed drove Rahmouni to the parking lot to meet [Tabler] around 2:00 a.m. on Friday morning. [Tabler] and his friend Timothy Payne were waiting for them in the truck that [Tabler] had borrowed. As soon as Zayed's car stopped, [Tabler] shot Zayed and then Rahmouni. He then exited the truck and pulled both men from the car. He saw that Rahmouni was still alive, so he shot him a second time. He had Payne videotape part of the shooting. Later that day, the videotape was destroyed after [Tabler] showed it to a friend. [Tabler] took a wallet and a black bag that he found inside the car. On the following Sunday night, [Tabler] was arrested, and in the early morning hours of Monday, November 29, he confessed to the shootings.
>
> At punishment, the State introduce evidence that [Tabler] also confessed to murdering Amanda Barfield and Tiffany Dotson, who were dancers at Teazers, because he believed that they were telling people that he had killed Rahmouni and Zayed.

Tabler v. State of Texas, 2009 WL 4931882 *1 (Tex.Crim.App. Dec. 16, 2009).

III. GROUNDS OF ERROR

Petitioner asserts the following grounds for relief:

1. The Texas Capital Murder statutes, both Texas Penal Code § 19.03 and Art. 37.071, C.Cr.P., are unconstitutional, violating Applicant's rights to due process under the Fourteenth Amendment to the United States Constitution.

2. Applicant was denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution in that he was denied the right to confront the witnesses against him.

3. Applicant was denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution, in that he was denied the right to present witnesses in his own behalf.

4. Applicant was denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution, in that he was denied counsel during a critical phase of trial.

5. Applicant was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution, in that he was sentenced to a cruel and unusual punishment due to the procedures utilized during his trial.

6. Applicant was denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution, in that he was denied the effective assistance of counsel at both the guilt/innocence and punishment phases of trial.

7. Applicant was denied due process under the Fifth and Fourteenth Amendments to the United States Constitution, in that constitutionally inadmissible evidence was admitted against him during the course of trial.

8. Applicant was denied his right to a fair and impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

9. Applicant's Death Sentence is Unconstitutional, because he is mentally ill, and the Eighth and Fourteenth Amendments Preclude the Death Penalty for the Mentally Ill.

10. Applicant was denied the Effective Assistance of counsel when Trial Counsel Failed to Object to the Prosecution's Argument That There Had to Be a Nexus Between the Mitigation Evidence and the Murders, in Violation [***Tennard***] ***v. Dretke***.

11. Applicant was Denied Due Process When the Prosecution Argued That the Jury Should Not Consider Relevant Mitigating Evidence in Violation of ***Tennard v. Dretke*** and [***Penry***] ***v. Lynaugh*** and [***Miller***] ***v. Johnson***.

12. Applicant Was Denied Due Process by the "12-10" Rule of Texas Article 37.071 §2(d)(2), and §2(f)(2), C.Cr.P.

13. Applicant was denied Due Process by Juror Misconduct.

14. Applicant was denied Due Process by Prosecutorial Misconduct.

Application for Post-Conviction Writ of Habeas Corpus ("Application"), pp. 4-6.

IV. LEGAL ANALYSIS

A. Exhaustion of State Remedies. Under Title 28, United States Code, Section 2264 ("§ 2264"), a federal court may not grant habeas relief in a state capital habeas proceeding unless the petitioner has exhausted his available state court remedies, which means having the issues addressed by the highest court in the

state. *Woodfox v. Cain*, 609 F.3d 774, 789-90 (5th Cir. 2010). This requirement is waived only when the failure to exhaust was: (1) "the result of State action in violation of the Constitution or laws of the United States;" (2) "the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or (3) "based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim of State or Federal post-conviction review." 28 U.S.C. § 2264(a).

Once failure to exhaust has been raised, the court must compare the petitioner's state and federal claims to determine whether the substance of those claims were presented to the state court, which is a "case- and fact-specific inquiry." *Id.*, *quoting Moore v. Quarterman*, 533 F.3d 338, 341 (5th Cir. 2008) (*en banc*).

> "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (internal citations omitted). "Rather, the petitioner must afford the state court a 'fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.'" *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004) (*quoting Anderson*, 459 U.S. at 6, 103 S.Ct. 276).

Woodfox v. Cain, 609 F.3d at 792 (footnote omitted). "A petitioner fulfills the exhaustion requirement if 'all crucial factual allegations were before the state courts at the time they ruled on the merits" of the habeas petition.'" *Smith v. Quarterman*, 515 F.3d 392, 400 (5th Cir. 2008), *quoting Dowthitt v. Johnson*, 230 F.3d 733, 746

(5th Cir. 2000), *cert. denied*, 532 U.S. 915, 121 S.Ct. 1250, 149 L.Ed.2d 156 (2001). The exhaustion requirement applies even if a petitioner's claims are now procedurally barred under state law. *Gray v. Netherland*, 518 U.S. 152, 161 (1996).

The only claims Petitioner effectively exhausted in the present case were those presented to the Texas Court of Criminal Appeals on direct appeal – (1) that the death penalty is unconstitutional because the Eighth and Fourteenth Amendments of the United States Constitution preclude the death penalty for the mentally ill; (2) that Petitioner received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's closing argument at the punishment phase that there must be a nexus between mitigating evidence and the offense; (3) that the prosecutor's closing argument at punishment violated *Tennard v. Dretke*, 542 U.S. 274 (2004); (4) that the trial court erred at the guilt phase when it denied Petitioner's request for jury instructions on self-defense, defense of a third person, and the lesser-included offense of murder; (5) that the trial court erred in failing to suppress Petitioner's statements as they were the fruits of an illegal arrest; and (6) that the trial court erred by declining to hold the "10-12 Rule" unconstitutional. Any claims beyond these are barred due to Petitioner's failure to exhaust them through the state courts. None of the waivers in § 2264 are applicable.

In regard to the unexhausted claims, Petitioner requests that this case again be stayed while he attempts to exhaust them through the state courts. A stay and abeyance are available only in limited circumstance – "if the petitioner had good

cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 277, 278, 125 S.Ct. 1528 (2005). Petitioner in this case specifically waived his state habeas proceedings, and his request to reinstate them was denied by the Court of Criminal Appeals. Since the failure to exhaust was due to Petitioner's choice, there is no good cause to disregard his actions. While Petitioner's attorneys argue that he lacked the mental competency to make such a waiver, the state court found to the contrary. Additionally, since the Court of Criminal Appeals denied Petitioner's request to reinstate his state habeas proceedings, there is nothing to indicate that his attempted state exhaustion would be met with success. Accordingly, Petitioner's Motion for Reconsideration of Ruling on Applicant's Request to "Stay and Abate" is **DENIED**.

In regard to the six issues raised before the Texas Court of Criminal Appeals, Petitioner has factually identified and briefed only four of those in the present action. Petitioner lists, but does not specifically address, the issue regarding the jury instruction on self-defense and the issue regarding the failure to suppress Petitioner's statements. As these issues have not been specifically identified or briefed, they will not be considered. See Rule 2 of the Rules Governing Section 2254 Cases.

B. Standard for Habeas Review. Section 2264 provides that review of a state capital case is subject to subsections (a), (d), and (e) of 28 U.S.C. § 2254, which provide:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
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> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
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> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) the claim relies on --

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Federal courts must defer to a state court's adjudication of a claim if the claim has been adjudicated on the merits in the state court proceeding unless the state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *Woodfox v. Cain*, 609 F.3d at 789. A decision is "contrary to federal law" if it contradicts a decision of the Supreme Court on a question of law or if it "resolves a case differently from the way the Supreme Court has on a set of materially indistinguishable facts." *Reed v. Quarterman*, 504 F.3d 465, 471 (5th Cir. 2007), *quoting Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). *See also Woodfox v. Cain*, 609 F.3d at 789. "Clearly established" under § 2254(d)(1) is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). "Clearly established" is limited to

determinations by the Supreme Court and refers to actual holdings of the Supreme Court as opposed to dicta. *Williams v. Taylor*, 529 U.S. at 381.

A state court "unreasonably" applies federal law when it identifies the correct governing principle established by the Supreme Court, but unreasonably applies it to the facts of the case. *Williams v. Taylor*, 529 U.S. at 407; *Woodfox v. Cain*, 609 F.3d at 789. *See also Woodward v. Epps*, 580 F.3d 318, 325 (5th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 2093, 176 L.Ed.2d 729 (2010); *Rogers v. Quarterman*, 555 F.3d 483, 488-89 (5th Cir.), *cert. denied*, ___ U.S. ___, 130 S.Ct. 365, 175 L.Ed.2d 62 (2009). Unreasonableness is evaluated objectively rather than subjectively. *Williams v. Taylor*, 529 U.S. at 409-10. An unreasonable application of federal law is distinguished from a state court decision that is merely incorrect or erroneous. *Woodfox v. Cain*, 609 F.3d at 789. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schirro v. Landrigan*, 550 U.S. 465, 473 (2007). Habeas relief is merited only when the state court decision is both incorrect and objectively unreasonable. *Williams v. Taylor*, 529 U.S. at 411.

It is the state court's ultimate decision that is to be tested for unreasonableness. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*), *cert. denied*, 537 U.S. 1104, 123 S.Ct. 963, 154 L.Ed.2d 772 (2003) (focus should be "on the ultimate legal conclusion that the state court reached and not on whether

the state court considered and discussed every angle of the evidence"). Even in cases where the state court fails to cite applicable Supreme Court precedent, or is even unaware of such precedent, the state court decision is still entitled to deference "so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]." *Early v. Packer*, 537 U.S. 3, 8 (2002).

When evaluating an unreasonable determination of the facts, the state court's findings of fact are entitled to a presumption of correctness which a petitioner may overcome only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Leal v. Dretke*, 428 F.3d 543, 548 (5th Cir. 2005), *cert. denied*, 547 U.S. 1073, 126 S.Ct. 1771, 164 L.Ed.2d 522 (2006). Relief may be granted only if "a factual determination is unreasonable based on the evidence presented to the state court." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir.), *cert. denied*, 541 U.S. 1087, 124 S.Ct. 2812, 159 L.Ed.2d 249 (2004).

In addition to the foregoing, the amendments to § 2254 contained in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") did not overrule prior precedent which forecloses habeas relief in the following instances: (1) claims which are procedurally barred as a consequence of a failure to comply with state procedural rules;[1] (2) claims for which the petitioner seeks retroactive application of a new rule of law on a conviction that was final before the rule was announced;[2] or

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1 *Coleman v. Thompson*, 501 U.S. 722 (1991).

2 *Teague v. Lane*, 489 U.S. 288 (1989).

(3) claims for which the petitioner asserts trial error that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict."[3]

C. Independent and Adequate State Grounds. Federal habeas review of a state court opinion is also precluded when the state court's decision was based upon an independent and adequate state law ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Rosales v. Dretke*, 444 F.3d 703 (5th Cir. 2006). "This rule is grounded in concerns of comity and federalism. It is designed to prevent federal courts from deciding cases on federal constitutional grounds regarding a petitioner's confinement that would be advisory because the confinement can be upheld on an independent and adequate state law basis." *Rosales v. Dretke*, 444 at 707. One of these grounds is procedural default, where dismissal is based upon a petitioner's failure to abide by state procedural rules. The procedural default rule prevents a habeas petitioner from avoiding exhaustion requirements by defaulting federal claims in state court. *Id.* "A state court expressly and unambiguously bases its denial of relief on a state procedural default even if it alternatively reaches the merits of a defendant's claim." *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999). A claim should be construed as one involving federal law when "the state court decision rests 'primarily on federal law' or the state and federal law are 'interwoven,' and if 'the adequacy and independence of any possible state law ground is not clear from

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[3] *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

the face of the opinion. . . .'" *Id., quoting Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007).

In order to be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed." *Ford v. Georgia*, 498 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). "If the state law ground is not firmly established and regularly followed, there is no bar to federal review and a federal habeas court may go to the merits of the claim." *Rosales v. Dretke*, 444 at 707, citing *Barr v. Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964). The Fifth Circuit has held that Texas's abuse-of-the-writ doctrine has "provided an adequate state ground for the purpose of imposing a procedural bar." *Barrientes v. Johnson*, 221 F.3d 741, 759 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134, 121 S.Ct. 902, 148 L.Ed.2d 945 (2001). *See also Rocha v. Thaler*, 626 F.3d 815, 829-30 (5th Cir. 2010), *cert. denied*, ___ U.S. ___, 132 S.Ct. 397, 181 L.Ed.2d 255 (2011); *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969, 119 S.Ct. 418, 142 L.Ed.2d 339 (1998); .

A petitioner may be excused from a procedural default only if he can demonstrate cause and prejudice for the default, or show that the failure to consider the claim will result in a miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at 750. Petitioner has made no such showing.

D. Constitutionality of Death Penalty. Petitioner argues that the Constitution prohibits his execution because he is mentally ill, a logical extension of the

prohibitions in *Roper v. Simmons*, 542 U.S. 551 (2005) (prohibiting imposition of death penalty against defendants under the age of 18) and *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting imposition of death penalty against defendants who are mentally retarded). The Constitution further prohibits the execution of a defendant who is insane as such a defendant "has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Ford v. Wainwright*, 477, U.S. 399, 409, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The Texas Court of Criminal Appeals rejected Petitioner's claim, adopting a previous holding in *Battaglia v. State*, No. AP-74,348, 2005 WL 120849 at * 10 & n. 39 (Tex. Crim. App. May 18, 2005) (not designated for publication). The Texas Court additionally noted that there is no authority from the Supreme Court "suggesting that mental illness that is a 'contributing factor' in the defendant's actions or that caused some impairment or some diminished capacity, is enough to render one exempt from execution under the Eighth Amendment." *Tabler v. State*, at * 2.

The Texas Court of Criminal Appeals's opinion was neither contrary to, nor "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The prohibitions against executing those who are mentally retarded or mentally incompetent have not been extended to individuals who may be mentally ill.[4] *See*

[4] The court assumes, for purposes of this proceeding, that Petitioner is mentally ill. However, his mental problems do not rise to the level of mental incompetence, as this Court previously found after an evaluation by Dr. Roger D. Saunders and an evidentiary hearing.

ShisInday v. Quarterman, 511 F.3d 514 (5th Cir. 2007), *cert. denied*, 555 U.S. 815, 129 S.Ct. 62, 172 L.Ed.2d 25 (2008); *In re Neville*, 440 F.3d 220 (5th Cir.), *cert. denied*, 546 U.S. 1161, 126 S.Ct. 1192, 163 L.Ed.2d 1146 (2006). *See also Ripkowski v. Thaler*, 438 Fed.Appx. 296, 303 (5th Cir. 2011), *cert. filed* Nov. 14, 2011 (No. 11-7512) ("The Supreme Court has never held that mental illness removes a defendant from the class of persons who are constitutionally eligible for a death sentence."); *U.S. v. Bourgeois*, 2011 WL 1930684, * 22 n. 26 (S.D. Tex., May 19, 2011) (slip op.) ("The Fifth Circuit has found that, absent any indication of insanity, the Constitution does not prevent the execution of mentally ill inmates."). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme Court]." *Knowles v. Mirzayance*, 556 U.S., ___, ___, 129 S.Ct. 1411, 1413-14, 173 L.Ed.2d 251 (2009) (internal quotation marks omitted). Accordingly, this ground is without merit.

E. Error in Closing Argument. Petitioner argues that the prosecutor's closing argument violated his constitutional rights in that the prosecutor told that jury that they need not consider mitigation if it was not connected to the crime. Petitioner asserts this violates of *Tennard v. Dretke*, 542 U.S. 274 (2004), which held that the

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According to Dr. Saunders, Petitioner suffers from Borderline Personality Disorder with Antisocial Personality Features. The report prepared by Dr. Kit Harrison, prepared in August 2011, indicates that Petitioner suffers from Type 1 Bipolar disorder accompanied by Intermittent Explosive Disorder. However, this diagnosis seems to have little relation to Petitioner's murders in that they were apparently committed with premeditation and significant planning.

jury in a capital murder prosecution cannot be precluded from giving full effect to a defendant's mitigating evidence. The Texas Court's opinion rejected Petitioner's claim because there was no contemporaneous objection made during trial. As this is an adequate and independent state ground, Petitioner's ground of error is barred.

F. Ineffective Assistance of Counsel at Closing Argument. Petitioner argues that trial counsel was ineffective when he failed to object to the prosecutor's closing argument at the punishment phase that there had to be a nexus between the mitigating evidence and the offense, in violation of *Tennard v. Dretke*. The Texas Court denied this ground on the basis that counsel's "conduct could have been grounded in legitimate trial strategy. . . ." *Tabler v. State*, at * 4. This decision was neither contrary to, nor "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The Sixth Amendment to the Constitution provides that the accused in a criminal prosecution has the right to assistance of counsel for his defense. In evaluating whether counsel's performance is inadequate, the Supreme Court has developed a two-prong test. *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, the petitioner must establish: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense so as to deprive him of a fair trial. *Id.* The proper standard for evaluating counsel's performance is that of reasonably effective assistance, considering all of the circumstances existing as

of the time of counsel's conduct. *Hill v. Lockhart*, 474 U.S. 52 (1985). Scrutiny of counsel's performance is "extremely deferential;" *Bell v. Lynaugh*, 828 F.2d 1085, 1088 (5th Cir. 1987); and counsel's conduct is "strongly presumed to fall within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690. Counsel's advice need not be perfect -- it need only be reasonably competent within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

Under § 2254, the "pivotal question" is not "whether defense counsel's performance fell below *Strickland's* standard," but "whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 785 (2011). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.*, quoting *Williams v. Taylor*, 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (emphasis in original). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.*, at 786-87.

"An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry'

threaten the integrity of the very adversary process the right to counsel is meant to serve." *Id.* at 788, quoting *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. "The question is whether an attorney's representation amounted to incompetence under 'prevailing norms,' not whether it deviated from best practices or more common custom." *Id.* When evaluating an ineffective assistance of counsel claim under § 2254, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.* "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Id.*, at 791.

The prosecutor made the following argument at the close of the punishment phase:

> Ladies and gentlemen, the second question talks about not just circumstances. It talks about mitigating circumstances and to be mitigating it has to mitigate something, doesn't it, or else it's just a word.
>
> Your charge says the jury shall consider mitigating evidence, be evidence that a juror might regard as reducing the defendant's moral blameworthiness. Well, his blameworthiness for what? I mean, it's not just a rhetorical question. It's his blameworthiness for his actions. You have to tie the two together.
>
> What the defense wants you to buy off on is that there's this bizarre notion of what mitigating is. . . . It's something that lessens the blame, so it has to be tied to an event, folks. . . .

> What is it about that that caused him to act this way? And therefore [he] shouldn't be held as accountable for his actions. That's what they want you to ignore.
>
> You know, his mom said that he left, took her car with him. She went to bed sick. Woke up. Car–he's gone. Well, maybe. You know, Dr. Debra Jacobvitz could have gotten up and said, you know, he's acting out against his mother because she rejected him and that's why he stole the car. Bingo. Could be a mitigating circumstance as to stealing momma's car. They didn't say that. But see that's how it works. That is the way it works.
>
> You know, he's not accused–he's not convicted of threatening or murdering his parents. His childhood might be a mitigating circumstance if that were a crime, otherwise it's just a circumstance. And there is a difference. . . .
>
> Doesn't have a thing to do with loading a 9 millimeter. . . . Because those are actions that need to be mitigated, if you can. And they can't. They can't. . . . There is no evidence that any [of the expert mitigating evidence] had anything to do with Richard Tabler's actions throughout his life. And they certain had nothing to do with the murder of the four folks here in Bell County. . . . There just are no mitigating circumstances. You don't even have to get to the part of whether the mitigating circumstances exist but are they sufficient to offset what he has done, or are they sufficient to reduce his moral blameworthiness? They're just not there and they can talk all day long but you didn't hear it from the witness stand. You didn't get it from any documents. It's just not there.

29 Reporter's Record ("RR") 51-53, 56-57, 58.

The *Tennard* Court did determine that it was inappropriate to require jurors to find a nexus between mitigating evidence and the crime with which the defendant was charged. However, the holding dealt with the special issues given to jurors, not to a prosecutor's closing argument. As the Respondent notes, no other Supreme

Court case has invalidated prosecutorial argument on the basis of the Eighth Amendment other than *Caldwell v. Mississippi*, 472 U.S. 320 (1985). A *Caldwell* violation is "relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 184, n. 15, 106 S.Ct. 2464, 2473, n. 15, 91 L.Ed.2d 144 (1986). A defendant establishes a *Caldwell* violation by showing that the remarks made to the jury improperly described the jury's role. *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S.Ct. 2004, 2010, 129 L.Ed.2d 1 (1994).

Petitioner presents nothing to establish that counsel's failure was not the exercise of legitimate trial strategy, as found by the Texas Court of Criminal Appeals, particularly when the argument was not in violation of *Caldwell* or *Tennard*.

Even assuming that Petitioner established that counsel's failure constituted ineffective assistance, he failed to establish prejudice. "With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Harrison v. Richter*, 131 S.Ct. at 787, quoting *Strickland*, 466 U.S. at 688.

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the

> outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable.

Richter, 131 S.Ct. at 791-792 (citations omitted).

The Texas Court of Criminal Appeals did not find that Petitioner had established prejudice.

> Without a fully developed record, we can only speculate as to trial counsel's strategy. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). Perhaps counsel did not want to call attention to the improper argument by objecting. Perhaps counsel believed that his own argument and the trial court's instructions sufficiently cured any error. Trial counsel broadly argued that [Tabler] was abnormal and so he could not be held to the same standards as a normal person. Counsel urged that, based on the mitigating evidence presented at trial, [Tabler] should not be held to the same level of accountability as "the rest of us." Counsel asserted that the evidence did not have to be connected to the offense in order to be mitigating. Additionally, the mitigating instruction provided by the trial court expressly commanded the jury to consider all of the evidence, including evidence of the defendant's background and character.

Tabler v. State, at * 6. In light of the record, Petitioner has failed to establish that the court's determination was in violation of § 2254.

G. The "12-10" Rule[5]. Petitioner argues that the "12-10" rule, as found within Article 37.071 of the Code of Criminal Procedure, violates his constitutional rights because it "creates an impermissible risk of arbitrariness, denies a defendant's right to individualized sentencing, denies the right to a fair and impartial jury, prevents a defendant from receiving effective assistance of counsel, and has a coercive effect upon the jury." *Tabler*, * 12. Each of Petitioner's arguments was rejected by the Texas Court of Criminal Appeals relying upon prior state authority which was, in turn, based upon federal constitutional grounds. *See Threadgill v. State*, 146 S.W.3d 654 (Tex.Crim.App. 2004); *Blue v. State*, 125 S.W.3d 491 (Tex.Crim.App. 2003); *Draughton v. State*, 831 S.W.2d 331 (Tex.Crim.App. 1992); and *Davis v. State*, 782 S.W.2d 211 Tex.Cr.App. 1989). This decision was neither "contrary to, [nor] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."

Under Texas law, a jury considering the imposition of the death penalty must consider two special issues.

> First, the trial court is required to submit the following "aggravating" special issue to the jury; "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1). If the jury unanimously answers "yes," the jury must then answer the following "mitigation" issue: "[w]hether, taking into consideration all of the evidence, including the circumstances of the

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[5] Some courts refer to this as the "10-12" Rule. This Court will use the title used by Petitioner.

> offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." *Id.* art 37.071(2)(e)(1). If the jury unanimously answers "no," then the defendant is sentenced to death. *Id.* art. 37.071(2)(g).
>
> Pursuant to these provisions, the trial court was also required to instruct the jury that it must have at least 10 "no" votes to answer "no" on the aggravating special issue, and at least 10 "yes" votes to answer "yes" on the mitigation special issue–either of which answers would result in a life sentence, not death. *Id.* art. 37.071(2)(g).

Druery v. Thaler, 647 F.3d 535, 542 (5th Cir. 2011), *cert. filed* Nov. 30, 2011 (No. 11-7657).

The arguments raised by Petitioner were also raised in the *Druery* case and rejected. As the *Druery* Court noted, "[t]o the extent Petitioner's challenge to Texas's 12-10 rule rests on *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and the Eighth Amendment, as well as due process under the Fourteenth Amendment, it is foreclosed by Fifth Circuit precedent." *Druery*, at 542. *See also Hughes v. Dretke*, 412 F.3d 582 (5th Cir. 2005), *cert. denied*, 546 U.S. 1177, 126 S.Ct. 1347, 164 L.Ed.2d 60 (2006). *Mills* found a capital sentencing scheme in violation of the Eighth Amendment because it precluded the jury "from considering mitigating evidence unless the jury unanimously agreed that a particular circumstance was supported by the evidence." *Druery*, 647 F.3d at 542. "The Fifth Circuit has refused, however, to invalidate the Texas sentencing scheme based on this decision." *Id.* The Fifth Circuit has previously determined that the sentencing

scheme in Texas is not sufficiently similar to the schemes identified in *Mills* and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) to permit relief. *Anderson v. Quarterman*, 204 Fed.Appx. 402, 409 (5th Cir. 2006), *cert. denied*, 549 U.S. 1249, 127 S.Ct. 1368, 167 L.Ed.2d 156 (2007). *See also Hughes v. Johnson*, 191 F.3d 607, 629 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145, 120 S.Ct. 1003, 145 L.Ed.2d 945 (2000) ("[u]nlike the systems discussed in *Mills* and *McKoy*, a single juror in Texas cannot preclude the remainder of the jury from considering mitigating evidence"); and *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994), *cert. denied*, 513 U.S. 1067, 115 S.Ct. 711, 130 L.Ed.2d 618 (1995).

The same is true for Petitioner's argument under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), wherein the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 105 S.Ct. at 2639. *See also Blue v. Thaler*, ___ F.3d ___, 2011 WL 6413668 (5th Cir., Dec. 22, 2011) (relying upon *Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) to hold that the Texas scheme does not mislead the jury about its role in the sentencing process and is not unconstitutional). A *Caldwell* violation is established when a defendant shows that remarks to the jury "improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989). The present

case is distinguished from *Caldwell* because the *Caldwell* prosecutor urged the jury not to view itself as the final arbiter of whether the defendant would die as their verdict would be reviewed for correctness by the state supreme court. There is nothing in the 12-10 rule which would lead the jury to believe that the ultimate responsibility for imposing a sentence of death would rest with any other actor.

The extension of *Mills* or *Caldwell* to the Texas capital sentencing scheme would be an unwarranted extension of federal law barred by *Teague v. Lane*, 489 U..S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).[6] "New rules of constitutional criminal procedure cannot be announced on federal habeas review unless one of two narrow exceptions applies. '[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government,' which is to say, when its 'result was not dictated by precedent existing at the time the defendant's conviction became final." *Blue v. Thaler*, * 13. The Fifth Circuit has held previously that an Eighth Amendment challenge to the jury instructions given under article 37.071(2) is barred by *Teague*. *See Webb v. Collins*, 2 F.3d 93, 94-95 (5th Cir. 1993) (per curiam). The holding has been reaffirmed in numerous published opinions. *Blue v. Thaler*, *13 n. 132. Petitioner presents no authority to the contrary.

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[6] Although Teague was a plurality decision, "the rule it announced was subsequently adopted by a majority of the Court in *Penry I*." *Blue v. Thaler*, ___ F.3d ___, * 13 n. 125 (5th Cir. Dec. 22, 2011). "*See Penry I*, 492 U.S. 302, 313-14, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)." *Id.*

In light of the foregoing, it is clear that those claims which were properly exhausted in the state court are without legal or factual basis. Accordingly, it is

ORDERED that the Respondent's Motion for Summary Judgment is **GRANTED**. It is further

ORDERED that the Petitioner's Application for Post-Conviction Writ of Habeas Corpus Under 28 U.S.C. § 2254 by a Person in State Custody is **DENIED** and this case is **DISMISSED**. It is further

ORDERED that any motions not previously ruled upon by the Court are **DENIED**.

Additionally, having considered the findings and conclusions set forth above and the requirements of 28 U.S.C. § 2253, the Courts finds, *sua sponte*, that a certificate of appealability should not issue, as Petitioner has failed to make a substantial showing of the denial of a constitutional right. Pursuant to 28 U.S.C. § 2262(b)(3), the stay of execution previously entered in this case is lifted.

SIGNED this 9th day of February, 2012.

WALTER S. SMITH, JR.
United States District Judge

No. 57382 ~~57932~~

FILED
3:32 p.m. o'clock
NOV 05 2008
SHELIA NORMAN
District Court, Bell County, Texas
By _____ Deputy

EX PARTE	§	IN THE 264th DISTRICT COURT
	§	
	§	OF
	§	
RICHARD TABLER	§	BELL COUNTY, TEXAS

Order Granting Request to Dispense with Habeas Proceeding and Releasing Court-Appointed Habeas Counsel

On September 30, 2008, came on to be considered the request of the defendant, Richard Lee Tabler, to waive his rights under Article 11.071, C.Cr.P., and to dispense with his *habeas corpus* proceeding. The Court has determined the following factors to be relevant:

1. On April 25, 2007, this Court appointed attorney David A. Schulman to represent the defendant in his *habeas corpus* action under Article 11.071, C.Cr.P.

2. On May 1, 2007, this Court appointed attorney John G. Jasuta to act as co-counsel and assist Mr. Schulman in the preparation of the defendant's *habeas corpus* application.

3. On August 22, 2008, the Court of Criminal Appeals received a communication from the defendant in which he requested that he be permitted to waive his right to the Article. 11.071 *habeas corpus* action.

4. At the hearing conducted by this Court on September 30, 2008, the defendant reiterated his desire to waive his rights and dispense with the Article 11.071 *habeas corpus* action.

5. At the hearing conducted by this Court on September 30, 2008, the Court inquired as to the defendant's competency. Mr. Schulman informed the Court that, while he disagreed with the defendant's decision to dispense with his *habeas corpus* action, he believed the defendant was competent to do so.

SCAN

22-70001 371

6. At the hearing conducted by this Court on September 30, 2008, the Court was provided with a copy of an evaluation competency evaluation conducted by Dr. Kit Harrison, of Houston, concluding that the defendant "is forensically competent to make decisions" to dispense with the *habeas corpus* action.

7. At the hearing conducted by this Court on September 30, 2008, the defendant acknowledged that he understood his decision was for all intents and purposes a final decision, given the time constraints of Article 11.071, and that, should he later change his mind and wish to reinstate his *habeas corpus* action, his attorneys will more than likely not have sufficient time to properly prepare and submit a *habeas corpus* application on his behalf.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED, that the defendant's request to waive his rights under Article 11.071, C.Cr.P., and to dispense with his *habeas corpus* action is hereby GRANTED. Mr. Schulman and Mr. Jasuta are hereby released from responsibilities arising from their respective appointments.

Mr. Schulman and Mr. Jasuta are hereby appointed standby counsel. They shall advise the defendant if requested to do so, and shall act as liaison to the Court should that be necessary.

The Clerk of Court is Ordered to provide a copy of this Order to the Clerk of the Court of Criminal Appeals.

SIGNED this 5 day of November, 2008.

JUDGE PRESIDING

22-70001.372

APPLICANT RICHARD TABLER **APPLICATION NO.** 72,350-01

MOTION TO PERMIT COUNSEL
TO CONTINUE OR RESUME
REPRESENTATION OF THE
APPLICANT AND TO ESTABLISH
A NEW FILING DATE FOR THE
APPLICATION XXX

DENY MOTION TO PERMIT COUNSEL TO CONTINUE OR RESUME REPRESENTATION OF THE APPLICANT AND TO ESTABLISH A NEW FILING DATE FOR THE APPLICATION.

Per Curiam 9/16/09

JUDGE DATE

WR-72,350-01

No. AP-75,677

IN THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN

Ex parte Richard Tabler
Applicant

Habeas Corpus Proceeding under Article 11.071, C.Cr.P., Following Conviction and Imposition of a Sentence of Death in the 264th District Court of Bell County, Texas, in Cause No. 57,382, the Honorable Martha Trudo, Judge Presiding

Motion to Permit Counsel to Continue or Resume Representation of the Applicant and to Establish a New Filing Date for the Application

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Richard Tabler, Applicant in the above styled and numbered cause, by and through David A. Schulman and John G. Jasuta, his undersigned attorney of record, and respectfully enters this "Motion to Permit Counsel to Continue or Resume Representation of the Applicant and to Establish a New Filing Date for the Application," and in support of such Motion would show the Court:

I

On July 6, 2009, the Court became aware that an application for a writ of habeas corpus under Article 11.071, C.Cr.P., had not been timely

filed, and that the trial court had not notified this Court, as required by Article 11.071 § 4(d), C.Cr.P., of that fact. On July 7, 2009, the Court therefore instructed the trial court to proceed under said Art. 11.071 § 4(d), and to supplement the record not later than July 22, 2009. The undersigned anticipate that the trial court will supplement the record of this Court with the Reporter's Record of a hearing conducted on September 30, 2008, and a copy of its order dated November 5, 2008, in which it granted Applicant's request to dispense with his habeas corpus action.

II

The undersigned are of the opinion that, despite his competency and his stated understanding of the fact that his decision to dispense with his habeas corpus action, Applicant should not have been permitted to make that decision. They would show the following.

First, the bizarre nature of Applicant's behavior is well known to this Court. Further, Applicant's behavior has been the subject of both statewide and national news coverage, following Applicant's unauthorized phone contact with Senator Whitmire. It is also well known that Applicant's various explanations as to how he came into possession of a cell phone are both illogical and contradictory. In short, Applicant's actions have been

more indicative of someone craving and seeking attention, rather than someone wishing to end all appeals and be promptly executed. Those actions demonstrate Applicant's inability to make sound informed decisions.

Second, the undersigned would show the Court that, between their appointment, on April 24, 2007, and September 30, 2008, Applicant asserted his intention to dispense with his appeals and volunteer for execution, only to change his mind, at least three separate occasions.

For example, the undersigned met with Applicant in June of 2007, and plans were jointly made regarding how to attack Applicant's conviction and sentence. One week after that meeting, on July 2, 2007, Applicant forwarded documents he had signed authorizing and requesting release of his files by trial counsel. Yet on July 9, 2007, Applicant wrote to both the undersigned and direct appeal counsel, informing them of his "change of heart," and decision to drop his appeals. On July 23, 2007, Applicant wrote, apologized for his previous request, and instructed the undersigned to continue on as before. There was a similar sequence of events later in 2007, and another in early 2008.

Throughout the Spring of 2008, Applicant participated in this case and requested assistance on unrelated matters on several occasions, never demonstrating any desire to end his appeals. Then, on May 15, 2008, Applicant again changed his mind and announced an intention of dropping all appeals. This ultimately led to the September 30, 2008, hearing and the trial court's order of November 5, 2008.

III

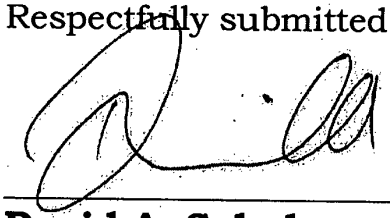
Pursuant to Article 11.071 § 4A(2), C.Cr.P., this Court has the authority to permit the undersigned to resume the active representation of Applicant in his habeas corpus action. Applicant's "on again - off again" requests to drop all appeals demonstrate Applicant's inability to make sound decisions, and that, because of that lack of ability, Applicant should not have been permitted to make the decision to dispense with his *habeas corpus* action. Consequently, the undersigned respectfully request the Court authorize counsel to proceed as set out in Art. 11.071 § 4A(2).

Prayer

WHEREFORE PREMISES CONSIDERED, Applicant prays this Honorable Court will grant his "Motion to Permit Counsel to Continue or Resume Representation of the Applicant and to Establish a New Filing Date

for the Application," and enter its Order permitting the undersigned to continue representation of Applicant, and establishing a new filing date for the application, not more than 180 days from the date the court permits the undersigned to continue representation, or until such time as set by this Court.

Respectfully submitted,



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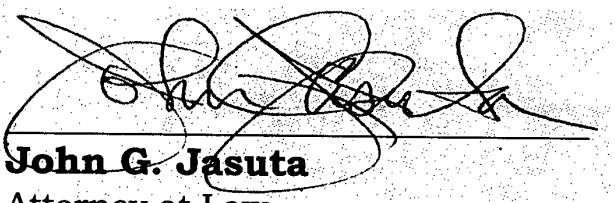

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Certificate of Delivery

This is to certify that a true and correct copy of the above and foregoing "Motion to Permit Counsel to Continue or Resume Representation of the Applicant and to Establish a New Filing Date for the Application" was hand delivered, mailed postage pre-paid or transmitted via telecopier (*fax*) or electronic mail (*eMail*) to the District Attorney of Bell County; Attention: Mr. Sean Proctor; PO Box 540; Belton, Texas 76513; on July 14, 2009.

David A. Schulman

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-72,350-01

EX PARTE RICHARD TABLER

ON NOTICE OF NO APPLICATION FOR WRIT OF HABEAS CORPUS FILED IN CAUSE NO. 57382 IN THE 264TH DISTRICT COURT BELL COUNTY

Per Curiam.

O R D E R

This case is before us because no application for writ of habeas corpus has been filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.[1] Applicant has filed in this Court a "Motion to Permit Counsel to Continue or Resume Representation of the Applicant and to Establish a New Filing Date for the Application."

On April 24, 2007, the trial court appointed David A. Schulman to represent Applicant

[1] Unless otherwise indicated all references to Articles refer to the Code of Criminal Procedure.

in a post-conviction writ of habeas corpus under Article 11.071. On October 1, 2008, the State filed in this Court its brief on Applicant's direct appeal. Pursuant to Article 11.071, § 4(a), counsel should have filed Applicant's application for writ of habeas corpus in the convicting court no later than November 17, 2008. No application was filed.

In the motion before us, habeas counsel explains that Applicant has made repeated "'on again - off again' requests to drop all appeals." Following a hearing on September 30, 2008, the trial court issued an order on November 5, 2008, granting Applicant's request to dispense with his habeas corpus action. On June 29, 2009, Applicant changed his mind and wrote the trial court a letter requesting that his "appeal" be reinstated. Habeas counsel argues in the motion before us that good cause has been shown to proceed under Article 11.071, § 4A(b)(2), because of Applicant's "inability to make sound informed decisions." However, the record of the trial court's hearing on September 30, 2008, demonstrates that Applicant made a knowing and voluntary choice to waive habeas review. We find that the failure to file Applicant's application for writ of habeas corpus is attributable to Applicant's own continued insistence on foregoing any such remedy. *See Ex parte Reynoso,* 228 S.W.3d 163, 166 (Tex. Crim. App. 2007). Good cause has not been shown under Article 11.071, § 4A. *See id.* Therefore, we deny Applicant's "Motion to Permit Counsel to Continue or Resume Representation of the Applicant and to Establish a New Filing Date for the Application."

IT IS SO ORDERED THIS THE 16TH DAY OF SEPTEMBER, 2009.

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-75,677

RICHARD LEE TABLER, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NO. 57,382
IN THE 264TH DISTRICT COURT
BELL COUNTY

JOHNSON, J., delivered the opinion for a unanimous Court.

OPINION

In April 2007, appellant was convicted of capital murder. TEX. PENAL CODE § 19.03(a)(7)(A). Based upon the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, §§ 2(b) and 2(e), the trial court sentenced appellant to death. Art. 37.071, § 2(g).[1] Direct appeal to this Court is mandatory. Art. 37.071, § 2(h). After reviewing

[1] Unless otherwise indicated, all references to Articles refer to the Texas Code of Criminal Procedure.

appellant's six points of error, we find them to be without merit. Accordingly, we affirm the trial court's judgment and sentence of death.

STATEMENT OF FACTS

Appellant does not challenge the sufficiency of the evidence to support his conviction. Therefore, we set out only a brief summary of the facts. Mohamed-Amine Rahmouni managed a topless bar called Teazers, where appellant worked until he and Rahmouni had a conflict. Rahmouni allegedly told appellant that he could have appellant's family wiped out for ten dollars.

Appellant decided on November 18, 2004, that he would kill Rahmouni after Thanksgiving. In preparation for killing Rahmouni, appellant borrowed a 9-millimeter gun, a camcorder, and a pickup truck. Then, on the night of November 25, 2004, which was Thanksgiving Day, appellant called Rahmouni with an offer to sell him cheap stereo equipment and told him they would meet in the parking lot of a local business. Haitham Zayed drove Rahmouni to the parking lot to meet appellant around 2:00 a.m. on Friday morning. Appellant and his friend Timothy Payne were waiting for them in the truck that appellant had borrowed. As soon as Zayed's car stopped, appellant shot Zayed and then Rahmouni. He then exited the truck and pulled both men from the car. He saw that Rahmouni was still alive, so he shot him a second time. He had Payne videotape part of the shooting. Later that day, the videotape was destroyed after appellant showed it to a friend. Appellant took a wallet and a black bag that he found inside the car. On the following Sunday night, appellant was arrested, and in the early morning hours of Monday, November 29, he confessed to the shootings.

At punishment, the State introduced evidence that appellant also confessed to murdering Amanda Barfield and Tiffany Dotson, who were dancers at Teazers, because he believed that they

were telling people that he had killed Rahmouni and Zayed.

CONSTITUTIONALITY OF IMPOSING THE DEATH PENALTY

In his first point of error, appellant asserts that his sentence of death is unconstitutional because the Eighth and Fourteenth Amendments of the United States Constitution preclude the death penalty for the mentally ill. He urges that the constitutional protection he seeks is a logical extension of the United States Supreme Court's decisions in *Roper v. Simmons* and *Atkins v. Virginia,* in which the Court found that imposing capital punishment on juvenile and mentally retarded offenders violates the Constitution. *Roper,* 543 U.S. 551 (2005); *Atkins,* 536 U.S. 304 (2002). Appellant asserts that evolving standards of decency dictate that the death penalty is unconstitutional as applied to people who have a lifelong and *bona fide* history of serious mental illness that diminishes their culpability.

Appellant acknowledges that the Supreme Court has not decided that mentally ill offenders are categorically less culpable than the average criminal. Nevertheless, as evidence of a growing public consensus against executing the mentally ill, appellant notes that the Texas Task Force for Indigent Defendants has provided funding for a special mental-health public defender for Travis County. He explains that Travis County has identified individuals with major mental-health problems, such as schizophrenia, bipolar disorder, and major depression, as needing special consideration in the criminal-justice system. Appellant urges that the creation of the special public-defender position constitutes an implicit recognition of mentally ill offenders as a class of persons with diminished culpability, such that they should not be punished to the same extent as other offenders. However, we do not agree with appellant's conclusion that the provision of a special public defender is equivalent to a categorical diminished-culpability determination. Moreover,

appellant does not demonstrate that there is a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally ill offenders. *See Atkins,* 536 U.S. at 312 (quoting *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989)) ("the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures'"). Nor has the Texas Legislature taken such a step.

We have observed in the past that there is no authority from the Supreme Court or this Court suggesting that mental illness that is a "contributing factor" in the defendant's actions or that caused some impairment or some diminished capacity, is enough to render one exempt from execution under the Eighth Amendment. *See, e.g., Battaglia v. State,* No. AP-74,348, 2005 WL 1208949 at *10 & n.39 (Tex. Crim. App. May 18, 2005) (not designated for publication) (citing *Colburn v. State,* 966 S.W.2d 511 (Tex. Crim. App. 1998)). In *Battaglia,* we declined to extend the federal constitutional proscription against execution of the insane and mentally retarded to the greater category of mentally ill defendants. *Id.* We adopt our holding in *Battaglia* today. Point of error one is overruled.

ERROR IN CLOSING ARGUMENT

In point of error three, appellant asserts that the prosecutor's closing argument at punishment violated *Tennard v. Dretke,* 542 U.S. 274 (2004), and was so egregious as to deny him due process, due course of law, and a fair trial. However, because appellant failed to object, he forfeited this complaint on appeal. *See Threadgill v. State,* 146 S.W.3d 654, 670 (Tex. Crim. App. 2004). Point of error three is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL AT CLOSING ARGUMENT

In point of error two, appellant asserts that trial counsel was ineffective when he failed to

object to the prosecutor's closing argument at the punishment phase that there had to be a nexus between the mitigating evidence and the offense. He asserts that this argument violated *Tennard,* 542 U.S. 274.

To support a claim of ineffective assistance of counsel, appellant must establish that trial counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. *See Narvaiz v. State,* 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (citing *Strickland v. Washington,* 466 U.S. 668, 694 (1984)). "Appellate review of trial counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Garza v. State,* 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). "If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been grounded in legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." *Id.*

Here, much of the prosecutor's argument was not an improper "nexus" argument, but was instead a permissible argument that the evidence of appellant's background did not reduce his blameworthiness. *See, e.g., Williams v. State,* 270 S.W.3d 112, 138 (Tex. Crim. App. 2008)(citing *Hawkins v. State,* 135 S.W.3d 72, 85-87 (Tex. Crim. App. 2004)(Womack, J., concurring)), and indicating that jury argument conveying that appellant's troubled background did not lessen his moral blameworthiness was permissible). However, the prosecutor arguably made an improper "nexus" comment when he stated that evidence that appellant had been abused and neglected as a child was not relevant in mitigation because his offense had not involved acting out against his abusive and neglectful parents. Appellant asserts that this comment ran afoul of the Supreme

Court's mandate that a jury must be able to consider any evidence that it could reasonably find warrants a sentence less than death, without regard to whether the defendant has established a nexus between such evidence and his crime. *See Tennard,* 542 U.S. at 285 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 441 (1990)).

Without a fully developed record, we can only speculate as to counsel's strategy. *Mitchell v. State,* 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). Perhaps counsel did not want to call attention to the improper comment by objecting. Perhaps counsel believed that his own argument and the trial court's instructions sufficiently cured any error. Trial counsel broadly argued that appellant was abnormal and so he could not be held to the same standards as a normal person. Counsel urged that, based on the mitigating evidence presented at trial, appellant should not be held to the same level of accountability as "the rest of us." Counsel asserted that the evidence did not have to be connected to the offense in order to be mitigating. Additionally, the mitigation instruction provided by the trial court expressly commanded the jury to consider all of the evidence, including evidence of the defendant's background and character.[2]

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[2] The jury was instructed:

> In deliberating on Issue No. 1 and Issue No. 2, the jury shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

As to Issue No. 2, the mitigation issue, the verdict form read:

> Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances that a sentence of life imprisonment rather than a death sentence should be imposed?
>
> You are instructed that in answering this issue, you shall answer the issue "Yes" or "No."

(continued...)

Because counsel's conduct could have been grounded in legitimate trial strategy, we will not presume on appeal that counsel's performance was deficient. Point of error two is overruled.

JURY INSTRUCTIONS ON DEFENSES AND LESSER-INCLUDED OFFENSE

In his fourth point of error, appellant asserts that the trial court erred at the guilt phase when it denied his request for jury instructions on self-defense, defense of a third person, and the lesser-included offense of murder. He reasons that if the jury had found that he was justified by self-defense or defense of a third person when he killed Rahmouni, then he would not have been found guilty of capital murder by murdering more than one person in the same transaction. Instead, he would have been convicted only of the murder of Zayed. *See, e.g., Moore v. State,* 969 S.W.2d 4, 12 (Tex. Crim. App. 1998) (in capital-murder prosecution under Section 19.03(a)(7)(A), if one of the two killings committed during the same criminal transaction had been justified, then appellant would have been convicted of only one murder).

Appellant asserts that he was entitled to these jury instructions because there was evidence that he was justified in killing Rahmouni. He points to his confession, in which he stated that, about a week before the murders, Rahmouni had told him, while waving a ten-dollar bill in his face, that he could wipe out appellant's whole family for ten dollars. Appellant asserts that this statement constituted a threat to him and his family, such that a rational jury could have found that he killed Rahmouni in self-defense or defense of a third person.

To justify the use of deadly force against another, an actor must first show that he reasonably

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[2](...continued)

> You may not answer the issue "No" unless the jury unanimously agree[s], and you may not answer the issue "Yes" unless ten or more jurors agree. The jury need not agree on what particular evidence supports an affirmative finding in this case. The jury shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

believed the force was immediately necessary to protect himself or a third person against another's use or attempted use of unlawful deadly force. TEX. PENAL CODE §§ 9.31(a), 9.32(a), 9.33 (Vernon Supp. 2002). The use of force against another is not justified in response to verbal provocation alone. TEX. PENAL CODE § 9.31(b)(1). However, a defendant does not have to prove that the other person was actually using or attempting to use unlawful deadly force; he is justified in using force to defend against danger as he reasonably apprehends it. *Hamel v. State,* 916 S.W.2d 491, 494 (Tex. Crim. App. 1996).

Here, appellant could not have reasonably believed that deadly force was immediately necessary to protect himself or his family from the use of unlawful deadly force. It is doubtful that Rahmouni's statement that he "could" wipe out appellant's family amounted even to verbal provocation. In addition, the verbal confrontation had ended several days before appellant lured Rahmouni to a deserted parking lot with the intention of killing him. Under these circumstances, the trial court did not err in refusing appellant's requested instructions. Point of error four is overruled.

ADMISSIBILITY OF APPELLANT'S STATEMENTS

In point of error five, appellant asserts that the trial court erred in failing to suppress appellant's statements because they were the fruits of his illegal arrest, in violation of the Fourth Amendment of the United States Constitution.[3] In reviewing a trial court's ruling on a motion to suppress, we give almost total deference to a trial court's determination of historical facts and review

[3] Appellant does not specifically complain that the admission of his statements violated Art. 38.23, but he does argue that his statements should have been suppressed because they resulted from, and were tainted by, an illegal arrest. In the interest of justice, we will consider the admissibility of appellant's statements under Art. 38.23. *See, e.g., Bell v. State,* 724 S.W.2d 780, 786 (Tex. Crim. App. 1986) (applying both Fourth Amendment exclusionary rule and Art. 38.23 in considering appellant's complaint that his statement should have been suppressed because it resulted from an illegal arrest).

de novo the court's application of the law. *Guevara v. State,* 97 S.W.3d 579, 583 (Tex. Crim. App. 2003). We will uphold the trial court's ruling if it is supported by the record and correct under some theory of law applicable to the case. *St. George v. State,* 237 S.W.3d 720, 725 (Tex. Crim. App. 2007) (citing *Armendariz v. State,* 123 S.W.3d 401, 404 (Tex. Crim. App. 2003)).

Here, the trial court's findings of fact are supported by the record. Killeen Police Officer Robert Clemons and Bell County Sheriff's Department Investigator Timothy Steglich testified at the pre-trial suppression hearing. Clemons testified that toward the beginning of November, appellant had begun "working off" a pending theft case stemming from his purchase of stereo equipment with fraudulent checks. Appellant signed a contract in which he agreed to cooperate as a confidential informant in a drug investigation in exchange for nonprosecution of the theft.[4] An investigator in the Bell County District Attorney's Office introduced appellant to Clemons. Appellant worked with Clemons on a controlled drug buy on November 4, 2004.

In the course of investigating the murders of Rahmouni and Zayed, the Bell County Sheriff's Department identified appellant as a "person of interest." Around 4:00 p.m. on November 28, 2004, which was the Sunday following Thanksgiving, Steglich, who was leading the murder investigation, contacted Clemons and asked him to speak with appellant about setting up a controlled drug buy. Both Steglich and Clemons understood that the drug buy was just a ruse. They wanted appellant to set up the buy and then go to the police station to meet Clemons so that they could arrest him on his pending theft case and then question him about the murders. Both officers were aware that no arrest warrant had been issued. Steglich had begun working with the district attorney's office on this matter some time before he contacted Clemons. However, he did not obtain an arrest warrant until

[4] The precise terms of this contract are not in the record.

about 10:55 p.m. that evening.

Clemons left a voice-mail message with appellant around 4:30 p.m., and appellant returned his call around 7:00 p.m. Appellant agreed to set up the drug buy and meet Clemons at the police station. He set up the buy and called Clemons to say that "Chris" would not be able to obtain the drugs until after 9:00 p.m. Appellant arrived at the police station around 9:15 p.m., and Clemons went through the motions of preparing for the buy. Steglich called in with updates about his progress in obtaining the arrest warrant. In turn, the police officers informed Steglich that appellant was becoming anxious to leave and make the drug buy. At about 9:25 p.m., Steglich instructed Clemons to arrest appellant, despite the fact that Steglich had not yet obtained a warrant.[5]

Clemons testified that appellant was enthusiastic about helping with the drug buy. Clemons did not view appellant's anxiety to leave the police station as a desire to flee; rather, he believed that appellant was anxious to complete the drug buy because it was getting late and his seller would be waiting for him as scheduled. Clemons initially handcuffed appellant incident to frisking and "wiring" him in preparation for the drug buy, and Clemons kept appellant handcuffed after he received instructions to arrest him. Clemons acknowledged that he did not *Mirandize* appellant in connection with his arrest until around 10:05 p.m. *See Miranda v. Arizona,* 384 U.S. 436 (1966).

As soon as appellant was informed he was under arrest for theft, he spontaneously volunteered that he had information about the murders. Appellant indicated that his friend "Tim" had committed the murders and then told him all the details. He said he wanted to talk to someone in the district attorney's office. Clemons testified that appellant was still focused on getting his theft

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[5] Clemons testified that Steglich told him the warrant had been obtained before he arrested appellant, but he also testified that Steglich told him to arrest appellant without a warrant because he was a flight risk. This inconsistency does not affect our resolution of this claim.

case dropped. Clemons did not interrogate appellant at that time, but appellant kept talking.

Steglich testified that he believed that appellant would flee if Clemons let him leave the police station to complete the drug buy. However, Steglich also testified that he had the impression that appellant was anxious to leave because he wanted to complete the drug buy, not because he wanted to escape. Even without direct evidence that appellant intended to escape, Steglich believed that appellant was "an extreme flight risk" based on his knowledge that appellant had arrests from several states, had moved frequently between states shortly before arriving in Killeen, was not steadily employed, had given two addresses in Killeen as his residence, and "other matters, including a warrant outstanding out of Florida that [Steglich] was unable to confirm." Therefore, when Steglich heard that appellant was becoming anxious to leave, he instructed Clemons to arrest him. Steglich did not begin questioning appellant until after he had obtained the magistrate's signature on the arrest warrant and appellant had been transported to the county jail.

After they had the arrest warrant, both Steglich and Clemons interrogated appellant. Clemons testified that, when they began the interrogation, he recorded it with a digital audio recorder, but the recorder's memory ran out before the first statement was completed and none of the remaining interrogation was recorded. In appellant's first written statement, he stood by his original story that Tim had committed the murders and then told appellant about them. This statement was taken at 12:20 a.m. on November 29. Steglich did not believe that appellant had told them everything because he was being evasive, fidgeting, failing to make eye contact, and focused on leaving the building. Therefore, they interrogated appellant further. Steglich acknowledged that by then he was pressing appellant for information. Appellant took bathroom breaks and drank coffee throughout the interrogation.

After additional questioning, appellant gave a second written statement which, unlike the first statement, included initialed *Miranda* warnings and a signed waiver. In it, appellant admitted that he was present while Tim committed the murders, and he gave consent to search his rooms at two residences as well as the car he had driven to the police department. This statement was taken at 2:20 a.m.

Still not satisfied that appellant had told them the whole story, Steglich and Clemons continued to question appellant. Steglich acknowledged that by then, he was moving in front of appellant, demanding eye contact, and asking appellant if he had ever lost a family member. Appellant became very emotional. Steglich had the impression that appellant realized he had lost control of the interview and was wearing down. However, appellant never said that he did not want to talk, that he wanted a lawyer, or that he wanted to take a break and get some sleep.

Appellant then gave a third written statement, which included *Miranda* warnings and a waiver. In it, appellant said, "I was pushed into a corner by these people and I will now tell the truth about these incidents." He then described how he had planned and executed the murder of Rahmouni, how he had intentionally murdered Zayed, and how he had taken a wallet and a black bag from Zayed's car after the murders. This statement was taken at 5:13 a.m.

After this testimony was complete, counsel argued that all of appellant's statements had to be suppressed because they were the fruit of an illegal arrest under Article 38.23, and no intervening events had removed the taint of the arrest. The prosecutor argued that the statements were admissible because the arrest was legal pursuant to Article 14.04, which provides an exception to the warrant requirement when the arresting officer has satisfactory proof from a credible source that the defendant committed a felony and is about to escape, so that there is no time to procure a

warrant. He also argued that the statements were admissible because Steglich had a warrant in hand by the time he interrogated appellant.

Defense counsel pointed out that law enforcement officials had had probable cause to arrest appellant on the theft case since before he began cooperating as an informant. Once they had probable cause, they could have gotten a warrant at any time in the weeks leading up to appellant's arrest. Counsel also argued that Steglich's testimony did not specify any reason he had to believe that appellant was more of a flight risk on November 28 than he had been before.

A. Legality of Arrest

"A police officer may arrest an individual without a warrant only if (1) there is probable cause with respect to that individual and (2) the arrest falls within one of the statutory exceptions." *State v. Steelman,* 93 S.W.3d 102, 107 (Tex. Crim. App. 2002); *see also McGee v. State,* 105 S.W.3d 609, 614 (Tex. Crim. App. 2003). Here, it is undisputed that the arresting officers had probable cause to arrest appellant for theft. Next, we must determine whether appellant's warrantless arrest fell within Article 14.04, which is the only applicable exception potentially supported by the record. Article 14.04 provides:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

Art. 14.04. The purpose of the statute is to give effect to the constitutional guarantee against the unreasonable seizure of the person and to safeguard the public in the apprehension of offenders who would escape if a warrant was imperative. *See Bell v. State,* 724 S.W.2d 780, 787 (Tex. Crim. App. 1986) (citing *Rutherford v. State,* 283 S.W. 512, 514 (Tex. Crim. App. 1926)).

Exceptions to the warrant requirement are strictly construed in favor of the defendant.

Dejarnette v. State, 732 S.W.2d 346, 349 (Tex. Crim. App. 1987). For an arrest to be justified under Article 14.04, there must be some evidence amounting to satisfactory proof, either related by a credible person to an officer or observed by the officer, indicating that the defendant was about to escape and that there was therefore no time to procure a warrant. *Id.* at 351. "What must be shown by satisfactory proof is the legal equivalent of constitutional probable cause." *Hughes v. State,* 24 S.W.3d 833, 838 (Tex. Crim. App. 2000) (quoting *Earley v. State,* 635 S.W.2d 528, 531 (Tex. Crim. App. 1982)) (internal quotation marks omitted). This requires more than mere suspicion, but far less evidence than that needed to support a conviction or even a finding by the preponderance of the evidence. *Id.*

Whether an officer has satisfactory proof that an escape is imminent is a fact-specific inquiry that requires consideration of the circumstances as a whole. *See, e.g., Hughes,* 24 S.W.3d at 840; *Dejarnette,* 732 S.W.2d at 352. Relevant factors include the defendant's temporal and geographic proximity to the scene of the crime. *Hughes,* 24 S.W.3d at 839. For example, it is unreasonable to require an officer to break pursuit and abandon the fresh trail of a recently committed crime, so that he may obtain an arrest warrant in the hope of encountering a defendant at some later time. *See id.* (citing *Anderson v. State,* 932 S.W.2d 502, 506 (Tex. Crim. App. 1996); *West v. State,* 720 S.W.2d 511, 517 (Tex. Crim. App. 1986)).

Similarly, an officer's knowledge that a defendant has just committed an offense or has just been informed that the police are looking for him may signal that otherwise ambiguous conduct is consistent with fleeing, such that a warrantless arrest is justified. *See Dowthitt v. State,* 931 S.W.2d 244, 258 (Tex. Crim. App. 1996) (citing *Allridge v. State,* 850 S.W.2d 471, 491 (Tex. Crim. App. 1991)); *Dejarnette,* 732 S.W.2d at 352 ("Common experience teaches us that otherwise amorphous

actions of a suspect may take on characteristics of escape simply because of the temporal proximity of those actions to the crime or to the suspect's discovery of police pursuit"). For example, a warrantless arrest was justified when police observed a defendant speaking with someone they had just questioned about the offense, and then driving away in a rented truck. *King v. State,* 631 S.W.2d 486 (Tex. Crim. App. 1982).

On the other hand, when hours or days have elapsed from the time of the offense or from the time the defendant has been informed that the police are looking for him, it is generally unreasonable to arrest the defendant without a warrant unless his conduct or words reveal an intent to escape. For example, a defendant's conduct of driving away from his house in the morning before the courthouse opened did not justify dispensing with an arrest warrant when police had no reason to believe that he was aware that they were looking for him and the offense had been committed more than 24 hours before. *See Stanton v. State,* 743 S.W.2d 233, 235 (Tex. Crim. App. 1988). Similarly, when a defendant went to a local bar several hours after he had been told that the police were looking for him, he had not shown an intent to escape. *See Bell,* 724 S.W.2d at 787. His warrantless arrest was illegal, notwithstanding the officer's concern that he would not know where to find the defendant after the bar closed. *Id; see also Maixner v. State,* 753 S.W.2d 151, 152-54 (Tex. Crim. App. 1988) (warrantless arrest of defendant in a local night club, prompted by concern that he might flee if he saw media coverage of officers' discovery of murder victim, was not justified).

Knowledge that a defendant moves around a lot may be relevant to the inquiry, but without more, it does not justify dispensing with the warrant requirement. *See Bain v. State,* 677 S.W.2d 51, 56 (Tex. Crim. App. 1984) (overruled on another ground in *Black v. State,* 739 S.W.2d 240, 245 n.2 (Tex. Crim. App. 1987)) (officer's knowledge that the defendant was a "transient" and therefore he

"moved about" did not justify dispensing with the warrant requirement, but arrest was legal because officer discovered defendant hiding on a freight train in another town, which was conduct consistent with escaping). The escape requirement is met where the suspect has previously fled, but standing alone, the fact that the suspect left the crime scene at some time in the past does not mean that he has "previously fled." *See Dejarnette,* 732 S.W.2d at 353 & n.3 (Tex. Crim. App. 1987) (discussing *West v. State,* 720 S.W.2d 511 (Tex. Crim. App. 1986)); *see also Busby v. State,* 990 S.W.2d 263, 270 (Tex. Crim. App. 1999); *Dowthitt,* 931 S.W.2d at 259 (citing *Fearance v. State,* 771 S.W.2d 486, 510 (Tex. Crim. App. 1988)); *Stanton,* 743 S.W.2d at 237 (discussing *Trammell v. State,* 445 S.W.2d 190 (Tex. Crim. App. 1969), and indicating that recent prior conduct of eluding police would satisfy escape requirement).

Here, Steglich testified to the circumstances that led him to believe that appellant would try to escape. At the time he decided to arrest appellant, Steglich was aware that appellant had moved frequently between states and had many recent arrests in other states. Steglich was also aware that appellant did not have steady employment and had reported multiple addresses in Killeen as his residence. In addition, Steglich had some information about, but he could not confirm, an outstanding warrant from Florida. He had identified appellant as a person of interest in the investigation of a double murder committed two days earlier.

While these circumstances supported a generalized suspicion or hunch, they did not constitute satisfactory proof that appellant was about to escape such that there was no time to procure a warrant. Appellant's conduct that was known to the officers when they decided to arrest him contradicted any intent to escape. Appellant had cooperated with the district attorney's office and with Clemons concerning his pending theft case. He had completed a controlled drug buy earlier

in the month as part of "working off" that case. Appellant was still in Killeen two days after the murders.

After the officers contacted appellant, he still did not show any intent to escape. He returned Clemons's phone call, and he represented that he was taking steps to set up the controlled drug buy as instructed. He called Clemons with progress reports, and he willingly drove to the police station, where he seemed eager to cooperate. He allowed himself to be handcuffed so that he could be frisked and "wired" for the drug buy. He seemed anxious to complete the buy and was focused on getting his pending theft case dropped.

The assessment of whether officers have satisfactory proof that an escape is imminent is evaluated in light of "the information available to the officers at the time the evidence concerning escape is related to them," not evidence that is discovered when the defendant is later apprehended. *Dejarnette,* 732 S.W.2d at 351. Moreover, we will not speculate about facts that are not part of the record of the suppression hearing. "There is nothing in the 'concrete factual situation spread on the record' from which it can be deduced that appellant was; in fact, about to escape." *See Stanton,* 743 S.W.2d at 236. We conclude that appellant's warrantless arrest was illegal.

B. Attenuation

Although appellant's warrantless arrest was illegal, the statements he made following his arrest may still be admissible if they were not tainted by the illegality. In determining whether the causal chain between the illegal arrest and appellant's statements was broken, such that his statements were the product of his free will, we consider four factors: (1) the giving of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *See Bell,* 724 S.W.2d

at 788 (citing *Brown v. Illinois,* 422 U.S. 590, 604-05 (1975)). Temporal proximity is an ambiguous factor that is weighed lightly, while the purpose and flagrancy of official misconduct is weighed heavily. *Bell,* 724 S.W.2d at 788; *Self v. State,* 709 S.W.2d 662, 668 (Tex. Crim. App. 1986). These factors are not exclusive, and each case must be decided on its own facts. *Self,* 709 S.W.2d at 668.

A finding of voluntariness for purposes of the Fifth Amendment is merely a threshold requirement for analysis under the Fourth Amendment because "[e]ven repeated warnings alone are not enough to purge the taint of an otherwise illegal arrest." *See Bell,* 724 S.W.2d at 788 (citing *Taylor v. Alabama,* 457 U.S. 687 (1982)). Here, Clemons first *Mirandized* appellant at 10:05 p.m., which was after appellant had been arrested for theft and had spontaneously begun talking about the murders, but before he was interrogated. Appellant continued talking about the murders after he was *Mirandized.* The first statement that Steglich took when he began interrogating appellant around 11:00 p.m. was a summary of information that appellant had voluntarily provided to Clemons prior to interrogation. Because this information was not inculpatory, Steglich completed this statement on a form that did not include written *Miranda* warnings. Appellant's second and third statements were completed on forms that included written *Miranda* warnings and waivers. Thus, appellant was *Mirandized* before and during the interrogation. This factor weighs in favor of attenuation.

The temporal proximity factor is also weighed lightly. *See Maixner,* 753 S.W.2d at 156. Appellant began volunteering information about the murders immediately after his arrest for theft. Lack of time for reflection, without significant intervening circumstances, generally weighs in favor of a defendant. *Bell,* 724 S.W.2d at 789. Here, however, it is apparent that appellant was not overwhelmed or intimidated by his arrest. *See, e.g., Rawlings v. Kentucky,* 448 U.S. 98, 108 (1980) (examining precise conditions of detention, including defendant's casual interaction with officers

and his spontaneous admissions, and weighing these factors heavily in favor of finding that defendant's admissions were made of his free will, unaffected by initial illegality, despite close timing). Appellant had been cooperating with Clemons and the district attorney's office in a drug investigation for several weeks, and he willingly went to meet with Clemons at the police station. Upon his arrest for theft, appellant spontaneously offered information about the murders with the hope of resolving his theft case. He was not then being interrogated. Accordingly, the temporal proximity factor favors suppression, but only lightly.

The fact that appellant spontaneously volunteered information about the murders, without being interrogated, is a significant intervening circumstance. *See Bell,* 724 S.W.2d at 789 n.5; *see also Crutsinger v. State,* 206 S.W.3d 607, 610 (Tex. Crim. App. 2006) (following illegal arrest, defendant's request to speak with detective was an independent act of free will and an intervening circumstance that weighed heavily in the State's favor). Furthermore, appellant was not interrogated until after the arrest warrant had been obtained. "Since the illegality was the lack of a warrant, after the warrant was obtained the causal relationship between the illegal arrest and subsequent evidence was severed." *Bell,* 724 S.W.2d at 791-92. This factor strongly favors attenuation.

The purpose and flagrancy of the official misconduct in this case also tends to favor attenuation. Most importantly, there was probable cause to arrest appellant for theft, and so the warrantless arrest, although illegal, did not violate the Fourth Amendment. *See Brick v. State,* 738 S.W.2d 676, 681 (Tex. Crim. App. 1987) (citing *Self,* 709 S.W.2d at 667-68) (fact that illegality rests solely upon violation of statute may influence assessment of purposefulness and flagrancy of misconduct, and, all other factors weighing equally, may ultimately tip the balance).

Additionally, this was not a situation where officers simply ignored the warrant requirement.

Cf. Stanton, 743 S.W.2d at 235, 237 (implicitly disapproving officers' untested assumption that they could not obtain an arrest warrant in time because the courthouse was closed). The record reflects that Steglich began seeking an arrest warrant around the same time that he decided to arrest appellant, and he continued working to obtain the warrant while Clemons executed the plan to arrest appellant. Steglich was investigating a double murder, and he was aware that whoever committed the crime was still at large. *Cf. Maixner,* 753 S.W.2d at 157.

Furthermore, there is no indication in the record that Clemons's conduct toward appellant, before and during the warrantless arrest, was calculated to cause surprise, fright, and confusion. Appellant went willingly (albeit under false pretenses) to the police station in response to a call from Clemons, under the terms of a pre-existing contract to work off his theft case.

Other considerations temper our assessment of this factor. The officers initiated their plan to arrest appellant at a time when they knew that they did not have, but needed, an arrest warrant. The record contains no explanation for why they contacted appellant for the purpose of luring him to the police station and arresting him without first obtaining a warrant.

In addition, although Steglich had probable cause to arrest appellant for theft, he never purported to have probable cause to arrest appellant for the murders. In this sense, the illegal arrest for theft was an expedition for evidence, undertaken in the hope that something might turn up in the murder investigation. This purpose for the arrest may favor suppression. *See Self,* 709 S.W.2d at 667 (quoting *Brown,* 422 U.S. at 605) (illegal arrest that was an expedition for evidence constituted flagrant official misconduct); *but see Crutsinger,* 206 S.W.3d at 611 (official misconduct was not purposeful or flagrant when police had probable cause to arrest defendant for credit-card abuse, but did not have a warrant, and the purpose of the arrest was to further a murder investigation).

A consideration that is more difficult to assess is the deception involved in the scheme to lure appellant to the police station in order to arrest him for theft and question him about the murders. We have hinted in the past that the use of deception to obtain a confession following an illegal arrest may favor suppression. *See Bell,* 724 S.W.2d at 789-90 (citing to J. Powell's concurrence in *Brown,* 422 U.S. at 611, and identifying illegal arrests effectuated as pretexts for collateral objectives as among the "most flagrantly abusive;" also observing that other jurisdictions have found unattenuated taint when illegal arrest was for the purpose of obtaining a confession and the arrestee was misled about that purpose); *see also Farmah v. State,* 883 S.W.2d 674, 679 (Tex. Crim. App. 1994) (when defendant was arrested without probable cause, officer's false claim that complainant had selected defendant out of a photo line-up, immediately followed by defendant's confession, weighed in favor of suppression); *Foster v. State,* 677 S.W.2d 507, 510 (Tex. Crim. App. 1984) (implicitly disapproving, following illegal arrest, ingratiatory police overtures and tactics that were "calculated to raise false hopes" and make defendant, a former prosecutor, "feel as if he were one of them, and his arrest was merely a 'matter that needed to be cleared up'").[6]

However, in other circumstances, we have found that the use of deception operated to diminish the flagrancy of the misconduct associated with an illegal arrest. *See Dowthitt,* 931 S.W.2d

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[6] In this respect, our Fourth Amendment analysis differs from our Fifth Amendment analysis. Assuming a lawful arrest, we have consistently found that the use of deception to obtain a statement does not violate due process. *See, e.g., Oursbourn v. State,* 259 S.W.3d 159, 182 & n.88 (Tex. Crim. App. 2008) (and cases cited therein) ("It is well established that lying about the state of the evidence is not the sort of 'overreaching' that implicates the due process clause, so long as the subterfuge used is not one likely to produce an untrue statement").

Finding that the use of deception does not violate due process, but recognizing that it may nevertheless exacerbate the flagrancy of the misconduct associated with an illegal arrest, is consistent with the well-settled principle that, in order for the causal chain between the illegal arrest and the statement to be broken, it is not enough that the statement meets the Fifth Amendment standard of voluntariness; rather, the statement must be sufficiently an act of free will to purge the primary taint. The statement's admissibility must be considered in light of the distinct policies and interests of the Fourth Amendment. *See Maixner,* 753 S.W.2d at 155; *Self,* 709 S.W.2d at 665 (quoting *Brown,* 422 U.S. at 601-602).

at 262 (officers' statements expressing confidence in Dowthitt's innocence may have been psychological manipulation, but they diminished flagrancy of misconduct and attenuated taint of warrantless arrest because they were made in an attempt to maintain a non-custodial atmosphere and assure and mollify the defendant, rather than in an attempt to surprise, frighten, and confuse him). Here, it is at least arguable that the use of deception to arrest appellant at the police station operated to assure and mollify him by minimizing the confrontational nature of the encounter.

On the particular facts of this case, the unexplained failure to wait for an arrest warrant and the use of deception did not render the misconduct flagrant and purposeful, while appellant's spontaneous declaration that he had information about the murders, plus the fact that the arrest warrant was obtained prior to interrogation, were significant intervening circumstances. We conclude that appellant's statements were sufficiently attenuated from the illegal arrest to be admissible. Therefore the trial court did not err in denying the motion to suppress these statements. Point of error five is overruled.

THE "10-12" RULE

In point of error six, appellant claims that the trial court erred by declining to hold the "10-12 Rule" unconstitutional. Appellant asserts that Article 37.071, § 2(a) creates an impermissible risk of arbitrariness, denies a defendant's right to individualized sentencing, denies the right to a fair and impartial jury, prevents a defendant from receiving effective assistance of counsel, and has a coercive effect upon the jury. We have consistently rejected these arguments. *See, e.g., Druery v. State,* 225 S.W.3d 491, 509 (Tex. Crim. App. 2007); *Threadgill,* 146 S.W.3d at 673; *Hathorn v. State,* 848 S.W.2d 101, 125 (Tex. Crim. App. 1992). Appellant has not persuaded us to revisit them here. Point of error six is overruled.

We affirm the judgment of the trial court.

Delivered: December 16, 2009
Do Not Publish

131 S.Ct. 70
Supreme Court of the United States

Richard TABLER, petitioner,
v.
TEXAS.

No. 09–9654.
|
Oct. 4, 2010.

Opinion

Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

All Citations

562 U.S. 842, 131 S.Ct. 70 (Mem), 178 L.Ed.2d 49, 79 USLW 3196

United States Court of Appeals for the Fifth Circuit

No. 22-70001

RICHARD LEE TABLER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:10-CV-34

ON PETITION FOR REHEARING EN BANC

Before GRAVES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 14, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-70001 Tabler v. Lumpkin
USDC No. 6:10-CV-34

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

Mr. Jefferson David Clendenin
Mr. Ari Cuenin
Ms. Cara Hanna
Mr. Shawn Nolan
Ms. Lanora Christine Pettit
Ms. Natalie Deyo Thompson
Ms. Claudia Van Wyk
Mr. Peter James Walker
Ms. Marcia Adele Widder

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 19, 2023
Lyle W. Cayce
Clerk

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Before GRAVES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

Certified as a true copy and issued as the mandate on Nov 22, 2023

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 19, 2023
Lyle W. Cayce
Clerk

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Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:10-CV-34

Before GRAVES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:[*]

The district court granted petitioner Richard Tabler a partial Certificate of Appealability ("COA") to appeal that court's denial of his habeas corpus petition. The COA covers two issues: first, whether Tabler's state habeas counsel abandoned him or otherwise performed deficiently by not challenging his competency to waive further habeas proceedings; and

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

second, whether Tabler was prejudiced by his trial counsel's failure to object to victim-impact evidence at the punishment phase of his capital murder trial. Addressing the first issue only, we conclude that Tabler's state habeas attorneys neither abandoned him nor rendered ineffective assistance by not contesting his competency to waive further habeas proceedings. Tabler therefore fails to show "cause" under *Martinez v. Ryan*, 566 U.S. 1 (2012), for procedurally defaulting his claim regarding his trial counsel's performance. We therefore do not address that claim.[1]

The district court's judgment denying Tabler's habeas corpus petition is AFFIRMED.

I.

A.

We have previously recited the facts regarding Tabler's 2007 conviction and death sentence for shooting two people to death. *See Tabler v. Stephens*, 588 F. App'x 297, 298–99 (5th Cir. 2014) ("*Tabler I*"), *vacated in part by* 591 F. App'x 281 (5th Cir. 2015) ("*Tabler II*"). Relevant to this appeal, in addition to those murders, Tabler was also indicted for murdering two young women for spreading news of his crimes. Those charges were eventually dismissed. During the punishment phase at Tabler's trial, however, the court allowed the women's relatives to testify about the effect their deaths had on family and friends. Tabler's trial counsel did not object to this evidence.

[1] We DENY Tabler's pending motion to expand the COA to include additional grounds.

Additionally, Tabler's trial counsel presented mitigating evidence at the punishment phase in an attempt to show that Tabler was "not normal." *Ibid.* This evidence included:

> (1) [T]estimony from Tabler's mother and sister about his difficult childhood, potential birth trauma, and history of psychiatric treatment; (2) testimony from Dr. Meyer Proler, a clinical neurophysiologist, concerning an abnormality of the left temporal frontal region of Tabler's brain that causes difficulty learning, planning, and weighing the consequences of actions; (3) testimony from Dr. Susan Stone, a psychiatrist, that Tabler suffered from a severe case of attention deficit hyperactivity disorder, borderline personality disorder, and a history of head injuries, all of which inhibited his ability to rationally assess situations and control his impulses; and (4) testimony from Dr. Deborah Jacobvitz, a psychologist, regarding the impact of parental neglect and abandonment on Tabler's development.

Ibid.

B.

The Texas Court of Criminal Appeals ("CCA") upheld Tabler's conviction and death sentence on direct appeal. *See Tabler v. Texas*, No. 75,677, 2009 WL 4931882 (Tex. Crim. App. Dec. 16, 2009), *cert. denied*, 562 U.S. 842 (2010). While that appeal proceeded to the CCA, Tabler went back and forth on whether to waive further state habeas proceedings. Before he ultimately waived these rights, his state habeas counsel retained an investigator and a mitigation specialist. The mitigation specialist spent about thirty hours working on Tabler's case; she met with him, reviewed the trial record, and communicated with habeas counsel.

Habeas counsel also received funds to have Tabler examined by a psychologist. In 2008, the court authorized Dr. Kit Harrison to "conduct[] a

neuropsycho[lo]gical evaluation appropriate in assisting counsel for the Defendant in the preparation of the defense." The court also asked Dr. Harrison to provide an opinion on Tabler's legal competency. About a month after his visit to Tabler in prison, Dr. Harrison sent a two-page letter to Tabler's counsel stating that Tabler was "forensically competent to make decisions to suspend his automatic appeal." Just over a month later, Dr. Harrison completed a report containing the results of Tabler's neuropsychological evaluation. The report noted that "Tabler demonstrate[d] a deep and severe constellation of mental illnesses" and "rapid-cycling mood destabilization with strong evidence of Bipolar Disorder, Type I." The report did not speak to Tabler's competency to waive his habeas rights. Tabler eventually wrote to the CCA, stating, "I wish to drop all my appeals & get an execution date."

The state court held a hearing to determine whether Tabler was competent to waive further habeas proceedings. Habeas counsel provided the court with Dr. Harrison's letter opining that Tabler was indeed legally competent. Counsel did not, however, provide the court with Dr. Harrison's subsequent report containing the results of his neuropsychological evaluation.

When asked at the hearing whether "the defense [was] ready to proceed," following Tabler's directive that he wished to waive his rights, his attorneys stated that they did "not announce ready[] because [they did] not intend to take a position one way or the other of what should happen." Counsel had told Tabler before this hearing that they did not think it was their job to help Tabler drop his habeas petition but neither was it their job to pursue habeas relief against Tabler's wishes. If the court asked whether they thought Tabler was competent to make this decision himself, counsel told him, they would tell the court that he was, "but that [would] be the extent of [their] involvement."

Counsel took no part in the ensuing colloquy between Tabler and the court, where Tabler stood by his decision to waive further habeas proceedings. After this conversation, the court permitted Tabler to waive his state habeas rights, and the court relieved counsel from any further obligation to investigate the case. Tabler was therefore without representation when his deadline for filing a state habeas elapsed in November 2008.

Nine months after the competency hearing and eight months after his state habeas petition was due, Tabler changed his mind. In a letter to the court, he asked to "pick all my appeals back up." On July 14, 2009, well past the forty-five-day deadline to file a state habeas petition, Tabler's state habeas counsel filed a motion to resume representation and establish a new filing date. The motion contended Tabler had been incompetent to waive his habeas rights. The CCA denied the motion, concluding that Tabler failed to show good cause because "his failure to file a timely writ of habeas corpus was attributable to his own continued insistence on foregoing that remedy." *Tabler I*, 588 F. App'x at 300.

C.

After the CCA denied Tabler's direct appeal and his motion to establish a new state habeas filing date, Tabler wrote a letter protesting a stay of execution in his case and requesting an execution date, which was effectively an expression of his desire to waive his federal habeas rights. The federal district court appointed Dr. Richard Saunders to perform a psychological evaluation before a competency hearing. Dr. Saunders found Tabler competent to waive further proceedings but concluded that his desire to waive was the result of the conditions of his confinement and his treatment by staff and other inmates. Accordingly, the district court ordered Tabler's federal habeas case to proceed because his previously expressed desire to waive had not been voluntary.

In 2012, the district court denied Tabler's federal habeas petition, which included a claim for ineffective assistance of trial counsel ("IATC"). The court rejected this claim because "the failure to exhaust" in state court "was due to [Tabler's] choice," and thus there was "no good cause to" justify allowing him to return to state court to exhaust this claim. Tabler's attorneys then moved to withdraw on the ground that new counsel was needed to offer unconflicted arguments about the impact of the Supreme Court's then-recent decision in *Martinez*. The court appointed new counsel for appeal.

We denied Tabler's request for a COA and affirmed the district court's denial of habeas relief. *See id.* at 298–99. A few months later, however, we reversed course, opting to remand for the district court to "consider in the first instance whether Tabler, represented by his new counsel . . . or other unconflicted counsel, can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief." *Tabler II*, 591 F. App'x at 281. Tabler filed an amended federal habeas petition addressing ineffectiveness of both state habeas counsel and state trial counsel under *Martinez*.

The district court ruled that Tabler did not demonstrate cause and prejudice under *Martinez*. The court determined that his state habeas attorneys were not deficient and, in the alternative, Tabler was not prejudiced by their conduct. Additionally, the court found that Tabler's trial attorneys were not ineffective.

The district court granted a partial COA to consider the effectiveness of state habeas counsel when they chose not to challenge Tabler's competency to waive further habeas proceedings. The COA also covered whether Tabler was prejudiced under *Strickland v. Washington*, 466 U.S. 668

(1984), when trial counsel did not object to the victim-impact evidence at punishment. Tabler unsuccessfully moved to alter or amend the judgment and to expand the COA under Federal Rule of Civil Procedure 59(e). This appeal followed.

II.

When reviewing a district court's denial of a writ of habeas corpus, we review the court's "factual findings for clear error and its legal conclusions *de novo*." *Mullis v. Lumpkin*, 70 F.4th 906, 909 (5th Cir. 2023). We also apply *de novo* review to mixed questions of law and fact "by independently applying the law to the facts found by the district court, as long as the district court's factual determinations are not clearly erroneous." *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir. 2005). "Ineffective-assistance-of-counsel claims are mixed questions of law and fact." *Mullis*, 70 F.4th at 909.

III.

On appeal, Tabler argues that he can show cause under *Martinez* for procedurally defaulting his IATC claim because his state habeas counsel both abandoned him and also performed deficiently at his competency hearing. The district court rejected these arguments. At *Martinez* prong one, the court ruled that Tabler's habeas attorneys neither abandoned him nor performed deficiently. Additionally, at *Martinez* prong two, the court ruled that Tabler could not support his underlying IATC claim. We limit our analysis to the court's *Martinez* prong-one ruling, which we affirm.[2]

[2] In *Mullis*, we recently clarified that our precedent was not abrogated by *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), and thus permits consideration of "evidence outside the state record . . . in *Martinez* claims for the limited purpose of establishing an excuse for procedural default." *Mullis*, 70 F.4th at 910–11 (citing *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016)). *Mullis* does not affect this case, however, because the district court considered evidence beyond the state record in finding no cause under *Martinez*.

A.

Federal courts are authorized "to issue habeas corpus relief for persons in state custody" by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Harrington v. Richter*, 562 U.S. 86, 97 (2011). A petitioner must first exhaust all available state court remedies. 28 U.S.C. § 2254(b)(1)(A). The Supreme Court, however, recognizes "an important corollary to the exhaustion requirement: the doctrine of procedural default." *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (citations and internal quotation marks omitted). Under this doctrine, a petitioner defaults his federal claims if he does not first assert them in state court consistent with state procedural rules. *Ibid.*

Tabler argues the procedural default of his IATC claim should be excused due to state habeas counsel's ineffectiveness. He can overcome procedural default only by showing (1) "cause for the default" and (2) "actual prejudice" resulting from "the alleged violation of federal law." *Id.* at 379 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). "Cause" means that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the State's procedural rule." *Ibid.* (citation omitted). An external factor is one that "cannot fairly be attributed to" the petitioner. *Coleman*, 501 U.S. at 753. To establish "actual prejudice," a petitioner "must show not merely a substantial federal claim, such that the errors at trial created a *possibility* of prejudice, but rather that the constitutional violation worked to his *actual* and substantial disadvantage." *Shinn*, 596 U.S. at 379–80 (cleaned up) (citation omitted).

Ordinarily, state habeas counsel's "ignorance or inadvertence" does not establish "cause" to excuse procedural default because the petitioner bears the risk of attorney error. *Id.* at 380 (citing *Coleman*, 501 U.S. at 753). But the Supreme Court carved out a "narrow exception" to this rule in

Martinez. 566 U.S. at 9. The Court held "that ineffective assistance of state postconviction counsel may constitute 'cause' to forgive procedural default of a trial-ineffective-assistance claim." *Shinn*, 596 U.S. at 380. The *Martinez* exception applies if the procedurally defaulted claim is IATC and "if the State's judicial system effectively forecloses direct review of trial-ineffective-assistance claims." *Ibid.* (citing *Trevino v. Thaler*, 569 U.S. 413, 428 (2013)); *see also Trevino*, 569 U.S. at 428 (holding Texas's judicial system satisfies this requirement). To establish "cause" under *Martinez*, we apply the familiar *Strickland* test. *See Martinez*, 566 U.S. at 14. Accordingly, the petitioner must show habeas counsel's performance was (1) "deficient" and (2) "prejudiced" his defense. *Strickland*, 466 U.S. at 687.

Another way to show "cause" under *Martinez* is attorney abandonment. *Maples v. Thomas*, 565 U.S. 266, 281 (2012). An attorney who "abandons his client without notice, and thereby occasions" default, severs "the principal-agent relationship." *Ibid.* A client therefore "cannot be charged with the acts or omissions of an attorney who has abandoned him," nor "faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Id.* at 283.

B.

We first address whether Tabler's state habeas attorneys were deficient under *Strickland* or abandoned him as in *Maples*. Tabler argues that habeas counsel performed deficiently by not challenging his competency to waive further state habeas proceedings and by failing to properly investigate his competency, thus satisfying *Strickland* prong one. *See Strickland*, 466 U.S. at 687. He largely relies on the same argument to show habeas counsel abandoned him. *See Maples*, 565 U.S. at 283. We disagree on both counts.

Counsel performs deficiently under *Strickland* by falling "below an objective standard of reasonableness." 466 U.S. at 688. In assessing

counsel's performance, however, courts must be "highly deferential," look to "the totality of the evidence," must eliminate the "distorting effects of hindsight," and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 695.

According to Tabler, his habeas attorneys performed deficiently by attending the competency "hearing as spectators rather than participants and wash[ing] their hands of Mr. Tabler." He also claims their investigation of his mental capacity was insufficient in light of their knowledge of the mental challenges he faced. Instead of "offer[ing] no resistance to their client's efforts to waive" his rights, Tabler argues his attorneys should have had him evaluated by a second psychologist to contest the opinion of Dr. Harrison.[3]

Texas law allows prisoners to waive state habeas review. *Ex parte Reynoso*, 228 S.W.3d 163, 165 (Tex. Crim. App. 2007) (per curiam). Prisoners may also waive state habeas representation, provided the waiver is "intelligent and voluntary." TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2(a); *see also Ex Parte Gallo*, 448 S.W.3d 1, 5 n.23 (Tex. Crim. App. 2014); *Mullis*, 70 F.4th at 912 n.6 (noting "[t]he competency inquiry differs from the knowing-and-voluntary inquiry," but, given the petitioner's arguments, "the distinction is irrelevant here"). The Fifth Circuit describes the postconviction competency inquiry as follows: (1) Does "the individual suffer from a mental disease, disorder, or defect?"; (2) Does "that condition prevent him from understanding his legal position and the options available

[3] Tabler also argues that habeas counsel failed to object to the state court's incorrect implication that his habeas deadline would occur after the CCA decided his direct appeal. We disagree. Habeas counsel repeatedly told Tabler that he needed to decide whether to proceed on state habeas long before his direct appeal was resolved. In one letter, in fact, Tabler's counsel told him that waiting until the CCA decided his direct appeal would occur well after they would have to file a habeas application.

to him?"; (3) Does "that condition nevertheless prevent him from making a rational choice among his options?" *Mullis*, 70 F.4th at 912 (citing *Mata v. Johnson*, 210 F.3d 324, 328 (5th Cir. 2000)).

Considering all the circumstances, Tabler has not cleared "*Strickland*'s high bar" to show state habeas counsel's performance was objectively unreasonable. *See Harrington*, 562 U.S. at 105 (citation omitted); *see also Strickland*, 466 U.S. at 695. To the contrary, his habeas attorneys followed his explicit wish to drop further habeas proceedings, reasonably finding him "competent to make this decision" for himself. *Cf. Wood v. Quarterman*, 491 F.3d 196, 203 (5th Cir. 2007) ("Neither the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence."). Throughout these proceedings, the trial court, the CCA, the federal district court, and the multiple mental health professionals that evaluated Tabler found him mentally competent to make substantive decisions surrounding his case.

In *Mullis*, we rejected an argument nearly identical to Tabler's. 70 F.4th at 911–14. There, petitioner argued his habeas counsel failed to challenge his waiver of habeas proceedings at a competency hearing and failed to give the court-appointed mental health expert all "relevant mental-health records, trial transcripts, and other information" the petitioner thought "'critical' to the evaluation." *Id.* at 912. We held that, "[g]iven the context, the habeas attorneys were reasonable in not challenging" the expert's conclusions about petitioner's competency. *Id.* at 913. Moreover, habeas counsel's decision was supported by the fact that counsel engaged a mental health expert and that there had been no previous finding that petitioner was incompetent to make decisions in his case. *Id.* at 914 ("[Petitioner's] habeas attorneys provided reasonably effective representation, even if their efforts were sometimes imperfect. The

investigation into [petitioner's] competence was adequate, given the available facts.").

Mullis is on all fours here. Just as in that case, Tabler "endured his entire trial without being found legally incompetent by the court," and the same judge who presided over the trial also presided over the competency hearing. *Id.* at 913. It was entirely reasonable, then, for Tabler's habeas counsel to "merely acquiesce[] to [Tabler's] wishes in light of a court-appointed expert's finding that [Tabler] was competent—wishes that are permissible given that defendants need not pursue habeas relief at all." *Id.* at 914. Most importantly, Dr. Harrison, the psychologist hired to review Tabler's competency to waive further habeas proceedings, concluded that Tabler was "forensically competent to make decisions to suspend his automatic appeal."

Tabler argues that Dr. Harrison's two-page letter was not thorough enough to be reasonably relied upon by counsel. *Cf., e.g.*, *Mullis*, 70 F.4th at 912 (court-appointed psychiatrist provided "a twenty-page report" explaining why the petitioner "was competent to waive his right to habeas review"). But the *length* of Dr. Harrison's letter did not determine whether counsel was reasonable in relying on it. As shown by Dr. Harrison's follow-on eighteen-page neuropsychological report stemming from the same evaluation, Dr. Harrison was well aware "of the contours of [Tabler's] diagnoses and mental-health history." *Id.* at 913; *see also Roberts v. Dretke*, 381 F.3d 491, 499 (5th Cir. 2004) ("[I]t is clear from Dr. Arambula's report that the doctor was well aware of the fact that Roberts had previously had suicidal thoughts."). Given that Dr. Harrison had the full picture of Tabler's mental health, it was reasonable for habeas counsel not to challenge Dr. Harrison's conclusions as to Tabler's competency.

Tabler also argues habeas counsel should have been on "notice" that his waiver was suspect because they knew about his extensive history of mental challenges. We disagree. Even assuming counsel doubted Tabler's competency to waive habeas, they reasonably cured that suspicion by outsourcing the question to a mental health professional. And contrary to Tabler's assertion, given these circumstances, habeas counsel had no duty to continue searching for a psychologist to contradict Dr. Harrison's opinion. *See Mullis*, 70 F.4th at 913 (holding, though "the opinion of a court-appointed psychiatrist does not always exonerate counsel of any duty to investigate further," given similar circumstances to here, the petitioner's "habeas attorneys did not have a duty to investigate more than they did").

Finally, Tabler's attempt to tar his counsel's performance as "abandonment" also misses the mark. The paradigm abandonment case, *Maples*, is nothing like this one. *See Maples*, 565 U.S. 266. Maples's attorneys left their law firm without informing Maples, and no other attorney stepped in to represent him. *Id.* at 283–84, 274. At the time of the procedural default, then, Maples had no way of knowing his attorneys were no longer representing him. *Id.* at 289.

The conduct of Tabler's habeas counsel is worlds away from the abandonment in *Maples*. Tabler's lawyers hired an investigator, a mitigation specialist, and a psychologist for a neuropsychological evaluation. They also attended the competency hearing and respected Tabler's desire to waive further proceedings. And although Tabler was technically unrepresented when his state habeas filing date expired in November 2008, he had ample notice that he would be proceeding without counsel. *Contra id.* at 281 (holding abandonment excuses default "when an attorney abandons his client *without notice*" (emphasis added)). Counsel informed Tabler before the competency hearing that he would not be arguing for or against Tabler's decision to waive further proceedings. Moreover, Tabler agreed that he did

not "want to continue [his] appeals after [his] direct appeal has concluded," he understood his attorneys had "time constraints" for filing a state writ of habeas corpus, and yet he stated, "There's nothing really more [that] needs to be said. I thanked [my attorneys] for what they did. I'm ready to go. Let's get this done." Even after this, his habeas counsel agreed to be available on standby and to remain as his lawyer, even if not formally because he was not filing a state habeas petition. In short, there was no abandonment.

C.

Tabler separately contends that his habeas attorneys performed deficiently by not giving the state judge all pertinent information about his mental health. We need not decide whether the attorneys were deficient in this regard because Tabler has not shown any prejudice, thus failing *Strickland* prong two. 466 U.S. at 687.

Tabler asserts that, if counsel had given the state judge Dr. Harrison's eighteen-page report containing the results of his neuropsychological examination, the judge would not have found him competent to waive further habeas proceedings. Although the report addressed issues separate from Tabler's competency, Tabler argues the report nonetheless contained information relevant to whether he could rationally choose among options. The federal district court rejected these arguments. It found that, even if counsel had provided the state court with Dr. Harrison's full report, there is no substantial likelihood that the court would have found Tabler incompetent to waive habeas. We agree with the district court.

Prejudice under *Strickland* means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also Harrington*, 562

U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

Dr. Harrison's report depicted a "deep and severe constellation of mental illnesses described on Axis I [that] have been disabling and debilitating for [Tabler] since at least early adolescence and have never been adequately managed from a medical or psychological standpoint." The report also identified "rapid-cycling mood destabilization" in Tabler, "with strong evidence of Bipolar Disorder, Type I." Had the state court seen this report—along with other convincing evidence that Tabler's waiver was driven by "severe mental illness"—Tabler argues it is probable that the court would not have found him competent to waive his state habeas rights. We disagree.

Tabler has not shown a substantial likelihood that the outcome would have been different had the state court seen this report. *See Harrington*, 562 U.S. at 112. Dr. Harrison was the same psychologist who authored a letter specifically opining that Tabler was mentally capable of waiving his state habeas rights. Furthermore, the judge at the competency hearing was the same judge that presided over Tabler's murder trial, where his attorneys presented evidence of mental incapacity similar to that provided in Dr. Harrison's eighteen-page report. *See Dennis ex rel. Butko v. Budge*, 378 F.3d 880, 894 (9th Cir. 2004) ("[J]udges who have an opportunity to observe and question a prisoner are often in the best position to judge competency, especially . . . where the judge has had more than one opportunity to observe and interact with the prisoner."). This evidence included multiple doctors testifying about Tabler's extensive history of mental challenges. Faced with that knowledge, in addition to its colloquy with Tabler at the competency hearing, the state court accepted Dr. Harrison's opinion and found Tabler competent to waive further proceedings.

Accordingly, we hold that Tabler has not shown a substantial likelihood that the full report from Dr. Harrison would have changed the outcome of the competency hearing. *See Strickland*, 466 U.S. at 694. Therefore, he cannot show cause under *Martinez* to overcome the procedural default of his IATC claim.

IV.

The district court's judgment denying Tabler's petition for writ of habeas corpus is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 22, 2023

Mr. Philip Devlin
Western District of Texas, Waco
United States District Court
800 Franklin Avenue
Waco, TX 76701

No. 22-70001 Tabler v. Lumpkin
USDC No. 6:10-CV-34

Dear Mr. Devlin,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Mary Frances Yeager, Deputy Clerk
504-310-7686

cc: Mr. Jefferson David Clendenin
Mr. Ari Cuenin
Ms. Cara Hanna
Mr. Shawn Nolan
Ms. Lanora Christine Pettit
Ms. Natalie Deyo Thompson
Ms. Claudia Van Wyk
Mr. Peter James Walker
Ms. Marcia Adele Widder

ORIGINAL

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 57382

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
vs.	)	BELL COUNTY, TEXAS
RICHARD LEE TABLER	)	264TH JUDICIAL DISTRICT

SPECIAL HEARING

On the 30th day of September, 2008, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Martha J. Trudo, Judge Presiding, held in Belton, Bell County, Texas.

Proceedings reported by computerized stenotype machine.

ORIGINAL

S O F

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P R O C E E D I N G S

(Proceedings in open court at 9:36 a.m.)

THE COURT: All right. The Court calls Cause No. 57382, styled the State of Texas versus Richard Lee Tabler for a hearing this morning that the Court has set.

Is the State ready to proceed?

MR. PROCTOR: State is ready, Your Honor.

THE COURT: And is the defense ready to proceed?

MR. SCHULMAN: The records show that we're -- that Mr. Jasuta and I are here as counsel, and Mr. Table is here.

And as I mentioned to Your Honor, off the record, we're here and do not announce ready; because we do not intend to take a position one way or the other of what should happen today.

THE COURT: All right. And then you are Richard Lee Tabler?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Mr. Tabler, we are here this morning, and I want to put on the record that I have met with both the State and defense prior to coming into court to talk a little about the process of this proceeding this morning. And we are here because I

have received a letter from the Court of Criminal Appeals that has been faxed to me that indicates that you want to drop your writ. And the direct appeal is still pending. But the reason we are here is because I have received that letter from the Court of Criminal Appeals -- although not directly from you but by way of the Court.

So I have set this date and asked counsel to be here and arranged for you to be brought here. Now I want to put on the record that we did have a discussion with counsel and the State to discuss the procedure here this morning. And I have asked -- I don't have the original of the letter, but there is a copy of the letter which the State has. And we'll be talking about that in a few moments.

Now if there's anything that I say or ask that you have any difficulty understanding, let me know and I'll ask it again. All right?

THE DEFENDANT: All right.

THE COURT: All right. Mr. Tabler, on the 2nd day of April 2007, this Court sentenced you to death by lethal injection after the jury found you guilty of the felony offense of capital murder in Cause No. 57382. Your direct appeal is still pending in the Court of Criminal Appeals.

Are you aware that your direct appeal process is not yet over?

THE DEFENDANT: Yes.

THE COURT: Under the laws of the State of Texas, if your direct appeal is affirmed you may proceed with your appeal by filing a petition for writ of habeas corpus in state court in order to appeal the validity of your conviction for capital murder.

Also, under federal law you may proceed with the habeas appeal in the federal courts after you have exhausted your state court remedies. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You should know that a habeas appeal is not automatic in capital murder convictions and that each defendant can decide whether he wants a habeas appeal.

If your direct appeal is affirmed, do you wish to go forward with the state habeas appeal by filing a state petition for writ of habeas corpus?

THE DEFENDANT: No.

THE COURT: If you do not want to proceed with the habeas appeal, are you aware, one, that the State of Texas will have the authority to carry out your sentence of death by lethal injection when your direct

appeal is concluded?

THE DEFENDANT: Yes.

THE COURT: That after the mandate of your direct appeal is returned the State, represented by the district attorney's office, will request that execution date be set for you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And in that event, under the laws of the State of Texas this Court can order the setting of execution date in your case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Knowing all this, if your direct appeal is affirmed, do you want to go forward with the state habeas appeal?

THE DEFENDANT: No.

THE COURT: Have you consulted with your counsel today about your decision?

THE DEFENDANT: Yes.

THE COURT: Have you been persuaded or coerced by anyone in any capacity to make your decision?

THE DEFENDANT: No.

THE COURT: At the time of your trial did you talk with your trial attorneys and this Court after you were convicted of capital murder and indicate that

you wanted an attorney appointed to represent you in a habeas appeal?

THE DEFENDANT: No.

THE COURT: So are you saying at this time that you don't want to continue your appeals after your direct appeal has concluded?

THE DEFENDANT: Correct.

THE COURT: Is that an accurate statement?

THE DEFENDANT: Yes.

THE COURT: All right. I have a document that I have just a copy of, and I'll ask the State if you have a copy of the document as well.

MR. PROCTOR: Yes, Your Honor.

THE COURT: Would you have that marked and --

MR. PROCTOR: It is marked, Your Honor, and I'm tendering to counsel at this time.

THE COURT: Mr. Tabler, would you look at this document that's marked State's Exhibit 1. That is copy of the document that I have received.

Is this your signature on this document State's 1?

THE DEFENDANT: Yes, it is.

THE COURT: It appears to be signed R. Tabler. Is that your signature?

THE DEFENDANT: Yes.
THE COURT: Would you tell the Court at this time what you are saying in this letter?
THE DEFENDANT: Basically, I'm asking the Courts of Appeals to drop all of my appeals after my direct appeal. And should my direct appeal be denied, I'm asking for an execution date as soon as possible.
THE COURT: Have you changed your mind at all since the date that you sent this letter to the Court of Criminal Appeals?
THE DEFENDANT: No.
THE COURT: Understand, Mr. Tabler, that if you do change your mind after the time period has run to file the writ, the Court of Criminal Appeals would consider it untimely and they might decline to entertain it. Do you understand this?
THE DEFENDANT: Yes.
THE COURT: All right. If you haven't done so, I want you to take a few moments and talk with your attorneys about these time period issues, these appellate time periods.
MR. GARZA: Judge, for clarification purposes, what has been marked I think as --
THE COURT: State's Exhibit No. 1.
MR. GARZA: -- State's 1 is -- and what

you just got through asking Mr. Tabler about is a letter written by him to the Court of Criminal Appeals, marked as State's 1, for clarification for this record. I just want to make sure, we've spoken about it as a letter and as a document, but both of those reference State's Exhibit No. 1 which has been tendered and I believe offered for purposes of this hearing today.

THE COURT: All right.

MR. GARZA: Any objection, counsel?

THE COURT: Do you have objection to the admission of State's Exhibit 1?

MR. SCHULMAN: No, Your Honor.

I would, for the record, state that I've seen the letter before. It was actually sent to us before it was sent to you, with instructions that it was going to be faxed to the Court. But it is the same letter. I don't think any of us have seen the original. It's in the Court of Criminal Appeals' records.

THE COURT: Thank you. State's Exhibit No. 1, is a letter directed to the Court of Criminal Appeals, dated August 11, 2008, which appears to be a letter by Mr. Tabler.

State's Exhibit No. 1, Mr. Tabler, that's your letter to the Court of Criminal Appeals that has been faxed to me. This letter indicates that you want

to waive your rights to habeas corpus proceeding and volunteer for execution. And that's the letter that is State's 1. And you have indicated that you had written the trial Judge. I had not received any letter from you to that effect. So the reason I have it is because it was faxed by the Court of Criminal Appeals.

You indicate in this letter, Mr. Tabler, that you want to drop all appeals for execution date. And you've asked that I be notified of it. And I have been. So at this time I'm going to admit State's Exhibit 1 for purposed of the appellate record.

(State Exhibit No. 1 admitted)

THE COURT: Now I've talked about with your lawyers, prior to coming in here, as well as the state, Mr. Tabler, about the appellate process and the time frame. And the -- your appellate attorneys for the writ purpose here have certain time constraints that they're under. And I think that they have probably discussed that with you.

Have you had a chance to discuss the time periods for the writ and for the appeal and the appellate process? And you understand what kind of time frame they're under?

THE DEFENDANT: Yes.

THE COURT: And I want you to understand

that if, in fact, you do change your mind, as I had said, that it may well be that the Court of Criminal Appeals might or might not be willing to give you additional time. Do you understand that?

THE DEFENDANT: I have no plans on changing my mind.

THE COURT: All right. And would you like to talk with your attorneys once again about this matter?

THE DEFENDANT: There's nothing really more needs to be said. I thanked them for what they did. I'm ready to go. Let's get this done.

THE COURT: All right. I think I have also -- do you have any concerns at this time, Mr. Tabler, regarding your competency and whether or not you are mentally competent to make this decision?

THE DEFENDANT: No. I'm competent enough.

THE COURT: All right. It's my understanding, from talking with your counsel, that they have -- in fact, I have authorized an evaluation of you to be conducted. And I would ask that -- I have been provided an information.

And Mr. Schulman, would you and your co-counsel like to, for purposes of the record, have me -- I can have this marked as a defense exhibit as

well and have this --

My concern is for competency. And I want you to make sure that you understand that you are able to make this decision. Mr. Tabler, so you are telling me you are. You have been evaluated. And I have a letter that indicates, without going into a lot of detail, that you have been examined by Dr. Harrison who has found you to be competent.

THE DEFENDANT: Yes, he came out to the Unit.

MR. SCHULMAN: May it please the Court. Obviously, the record reflects that we have provided this copy to the Court. But for purposes of the record, I would make it clear this was provided to you by us as officers of the Court. I think it would be inappropriate for us to offer it as an exhibit and respectfully suggest that it be marked as a Court's exhibit.

THE COURT: Then I'll mark it as Court's Exhibit 1. And this is a letter, that's dated July 28th, 2008 and provided to this Court this morning, in which I had asked that you be evaluated to determine if you are able to make such weighty decisions. All right. That's admitted.

(Court's Exhibit No. 1 admitted)

THE COURT: Now is there anything further the State would like to offer or proceed with this morning?

MR. PROCTOR: No, Your Honor.

As you are aware, the usual practice is to have the defendant -- have the State submit a motion for the defendant's examination for competency at this time and the Court to order that. But since that has already been taken care of, the State doesn't have anything further at this time.

THE COURT: Defense, do you have anything further at this time?

MR. SCHULMAN: No, Your Honor.

THE COURT: All right. Then we will be waiting the appeal time, I guess, for the results of the direct appeal. And then subsequent to that then we'll probably have another hearing date at that time to set an execution date.

And with that, if there's nothing further, then we'll be in recess.

MR. GARZA: Judge, if we could have this hearing transcribed and made a part of the court's file, please.

THE COURT: I will order that.

MR. GARZA: Thank you.

THE COURT: All right. Thank you, counsel. Thank you, State.

Do we have anything else to put on the record?

MR. SCHULMAN: Just to clarify -- this is strange. I presume at this point that --

THE COURT: I forgot to say that I would keep you on as standby counsel. I intend to do that. We should -- I should have told him that.

MR. SCHULMAN: We have already told him that, Your Honor, and made it clear to him in letters that one thing has got nothing to do with the other. We will stay on as his representatives to whatever extent he wants so long as he's in the system.

I just want to make clear that -- I presume the Court is not going to be granting requests for additional funding that we have made, and that Mr. Jasuta and I are released, if you will, from further actions in this case, in the --

MR. JASUTA: With regard to mitigation, et cetera.

THE COURT: Yes. With regard to proceeding with any mitigation experts and such as that, we won't go forward; and I won't authorize anymore funding for that. But you will be available for

standby, counsel?

MR. JASUTA: Yeah.

MR. SCHULMAN: We will do that. And I personally consider that my responsibility, having nothing to do with court appointments. I'm his lawyer. I'll be his lawyer. Never lost one this way.

THE COURT: All right. Anything else, Mr. Proctor?

MR. PROCTOR: No.

THE COURT: Thank you. We'll be in recess.

(Proceedings recessed at 9:51 a.m.)

STATE OF TEXAS)

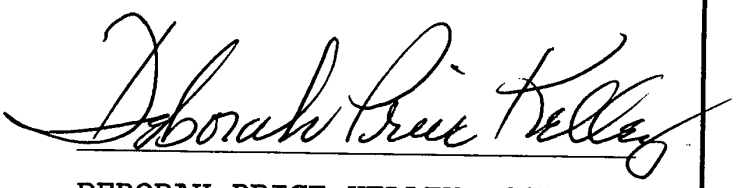
COUNTY OF BELL)

I, DEBORAH PRICE KELLEY, Official Court Reporter in and for the 264TH District Court of Bell County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $93.80 and was paid/will be paid by the 264th Judicial District Court, Bell County, Texas.

WITNESS MY OFFICIAL HAND on this, the 12TH day of NOVEMBER 2008.



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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

RICHARD LEE TABLER,	
Petitioner,	CIVIL ACTION No. W-10-CA-034
v.	
	THIS IS A CAPITAL CASE
WILLIAM STEPHENS, Director, Correctional Institutions Division, Texas Department of Criminal Justice,	
Respondent.	

AMENDED PETITION FOR WRIT OF HABEAS CORPUS, ON REMAND, BY A PRISONER IN STATE CUSTODY, PURSUANT TO 28 U.S.C. § 2254 *et seq.*

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Dated: September 9, 2015

PRELIMINARY STATEMENT RESPECTING CITATION AND FORM

State court proceedings in the Reporter's Record are cited as [Volume number] RR [page number]. Pleadings and orders that are part of the Bell County Clerk's Record prepared for direct appeal are cited the same way: [Volume number].CR.[page number]. The record on appeal in the Fifth Circuit is cited as R., and excerpts from the record as RE, both followed by page number. Pleadings docketed in this Court are cited as "Doc." Petitioner Richard Tabler is referred to by name or as "Petitioner."

The opinions of the Texas Court of Criminal Appeals and the Court of Appeals for the Fifth Circuit are unpublished and appear in the appendix. They are cited by reference to the appendix and, in the case of the Fifth Circuit opinions, the unofficial Westlaw citations.

All emphasis is added unless otherwise indicated; parallel citations are omitted.

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INTRODUCTION

Richard Tabler is a severely mentally ill individual. He was born with two independent congenital birth defects – Klinefelter's Syndrome ("extra X chromosome syndrome") and Fetal Alcohol Spectrum Disorder as a result of his mother's alcohol use during pregnancy – and was then raised in a disconnected and violent home. It is no wonder that now and throughout his life, he has suffered from a combination of debilitating mental illnesses. The defects in his brain have profoundly affected his mental state, his outlook on the world and his ability to cope with even the simplest matters in life. As he grew, he developed other severe mental health conditions, some directly related to genetic, neurological, and hormonal disorders and others to the neglected, chaotic upbringing that was superimposed on his biological defects.

From his earliest years, Mr. Tabler displayed a deep inability to control his emotions or moderate his impulses. He suffered tantrums and wild mood swings from an early age and well into adulthood. He was so slow to walk and talk that adults assumed he was deaf or intellectually disabled. He wet the bed until he was eight years old and he sucked on two fingers from infancy well into his teens. He struggled severely with schooling both academically and socially. Teachers recalled Richard as a lonely, unhappy child, neglected at home and unable to navigate social interactions with peers.

At home, Richard's parents' marriage, buffeted by infidelity, heavy drinking, violence and neglect of the children, fell apart when Richard was nine. At what should have been the age of puberty, his voice did not change and facial hair never developed. His inability to control his impulses and racing thoughts continued and he began to suffer from extreme anxiety, which he discovered he could alleviate by cutting himself.

The unhealthy family dynamics interacted with Richard's congenital defects to spawn secondary disorders. Professionals who evaluated him in his teens and twenties diagnosed him

with bipolar disorder, borderline personality disorder, and severe attention deficit disorder. Over this period, Richard would cut his arms regularly and attempted suicide more than a dozen times. By his early twenties he was homeless, his birth defects had caused his upper teeth to rot and fall out, his arms bore the scars of cutting and repeated suicide attempts, and he had fallen into alcohol and drug abuse.

Unfortunately, Mr. Tabler's attorneys at both trial and state habeas failed to provide reasonable representation, or to conduct a constitutionally adequate investigation into his background. Had they done so, they would have easily uncovered the compelling mitigation case that is now presented to this court. Such mitigation evidence would have humanized Mr. Tabler and provided rebuttal to the government's portrayal of him as a conscienceless sociopath.

In state habeas proceedings, counsel's abandonment of Mr. Tabler and related failures prevented the court from considering crucial mental health evidence and caused Mr. Tabler to fail to exhaust his claims in state court. Throughout these proceedings, Mr. Tabler would often write to post-conviction counsel, sometimes expressing interest in his litigation and sometimes expressing an equivocal desire to waive his state habeas proceedings, usually to take place on some future date after the conclusion of his direct appeal. Mr. Tabler changed his mind regarding this issue countless times, but never instructed counsel not to investigate.

Despite the glaring signs of serious mental illness, unstable decision-making, suicidal behavior, and knowledge that Mr. Tabler had vacillated repeatedly regarding his desire to waive, counsel failed to alert the court to these concerns, which call into question the voluntariness of the waiver and competency to waive. Rather, counsel stood mute, abdicating their roles as advocates. They gave Mr. Tabler misinformation about his deadline for a final decision about waiver – leaving him to understand that he could change his mind until his direct appeal was

over. Because of counsel's deficient performance, the court found Mr. Tabler competent to waive. And, despite a state law duty to continue to investigate, even at that stage, counsel abandoned all investigation into Petitioner's case.

Mr. Tabler is a severely mentally ill individual. His medical and genetic defects, which have never before been presented to a court because of counsel's deficiencies, are profoundly mitigating. Mr. Tabler should not be executed.

PROCEDURAL HISTORY

A. State Court Proceedings

1. On February 16, 2005, Richard Tabler was indicted in Bell County, Texas, on two counts of capital murder for intentionally or knowingly causing the deaths of Haitham Zayed and Mohamed Amine Rahmouni by shooting them in the same criminal transaction on November 26, 2004. A45; I.CR1-2. RE 4.[1] His trial began in March 2007. The culpability phase, conducted from March 19-21, 2007, ended with verdicts of guilty of the charged offenses. I.CR.249, 24.RR.51 (RE 5). The penalty phase began on March 27, 2007, and ended on April 2, 2007, with jury verdicts on the special issues that compelled imposition of the death penalty. I.CR 311-13 (RE 5); 29.RR. 61. The trial court formally imposed the death sentence on April 2, 2007. I.CR. 311-13; 29.RR. 63-64.

2. Mr. Tabler's direct appeal and habeas corpus cases proceeded simultaneously, pursuant to Texas law. Tex. Code Crim. Proc. art. 11.071(4)(a). Shortly after his direct appeal counsel filed his brief in the Court of Criminal Appeals, the trial court ruled at a hearing held September 30, 2008, that Mr. Tabler wished to waive his post-conviction rights and was competent to do so. V.CR. 355-70 (RE 6). Within months, Mr. Tabler's post-conviction counsel moved on his behalf to withdraw the waiver, but the Texas Court of Criminal Appeals denied the motion. A43; *Ex parte Richard Tabler*, No. WR-72, 350-01 (Tex. Crim. App.) (delivered September 16, 2009). On December 16, 2009, the Court of Criminal Appeals ("CCA") affirmed the convictions and death sentence on direct appeal. A18; *Tabler v. State*,

[1] Mr. Tabler was also indicted in Bell County for the shooting deaths of Tiffany Dotson and Amanda Benefield on November 28, 2004, but those charges were dismissed after the capital conviction and death sentence. A83-85.

No. AP-75,677 (Tex. Ct. App.) (unpublished), 2009 WL 4931882 (RE 7). The state obtained a warrant scheduling Mr. Tabler's execution for May 20, 2010. *See* R. 2.

B. Federal court proceedings

3. On February 12, 2010, before a petition for writ of *certiorari* had been filed to seek review of the direct appeal decision, the attorneys who had been appointed to represent Mr. Tabler in state post-conviction proceedings moved in this Court for appointment and a stay of execution. R. 5-35. On February 25, 2010, this Court granted the motions and ordered the case administratively closed pending Mr. Tabler's exhaustion of remedies through his petition for writ of *certiorari*. R. 39-40. The Supreme Court denied *certiorari* on October 4, 2010. *Tabler v. Thaler*, 562 U.S. 842 (2010).

4. At counsel's request, this Court appointed a psychologist to address Mr. Tabler's competency to waive his federal habeas rights, and held a hearing on August 17, 2011. R. 135-37, 147, 156-77 (hearing transcript). The Court found that Mr. Tabler's efforts to waive were involuntary, and ruled that habeas proceedings should go forward. R. 174-75; *see also* R. 151-55 (order, dated August 18, 2011); Rec. Doc. 34 (sealed order, dated August 18, 2011).

5. In response, on October 3, 2011, Mr. Tabler's attorneys filed an "Incomplete or Preliminary" habeas corpus petition raising fourteen claims (R. 178-85), and a motion to stay and hold the proceedings in abeyance, to permit Mr. Tabler to return to state court to challenge the voluntariness of his state court waiver and to exhaust claims. R. 186-224. This Court denied the stay and abeyance on October 11, 2011, and ordered the filing of a complete habeas petition. *See* Text Order re Doc. 37.

6. Mr. Tabler's habeas corpus petition was filed on November 13, 2011. R. 229-454. The Director responded and moved for summary judgment on December 13, 2011. R. 455-91. Although the Court directed Mr. Tabler to file a response by January 13, 2012, counsel did not file one. R. 492, 496. The Court issued an order and judgment, denying the habeas petition and denying a certificate of appealability ("COA") on all issues on February 9, 2012. R. 493-521 (RE 8). On April 4, 2012, it denied a Rule 59(e) motion, which had sought reconsideration and an opportunity to exhaust claims in light of the Supreme Court's recent decision in *Maples v. Thomas*, 132 S. Ct. 912 (2012), and the then-pending action in *Martinez v. Ryan*, Sup. Ct. No. 10-1001. R. 547-49. RE 2.

7. On May 1, 2012, the Court permitted Mr. Tabler's counsel to withdraw. Substitute counsel, Marcia A. Widder (then a solo practitioner in New Orleans, Louisiana)[2] was appointed and filed a timely notice of appeal and request for COA. R. 550-59, 570, RE 3. On October 3, 2014, the Fifth Circuit denied a COA. A1; *Tabler v. Stephens*, 588 F. App'x 297 (5th Cir. Oct. 3, 2014). The court determined, among other rulings, that the state post-conviction competency hearing did not violate Mr. Tabler's due process rights, that his post-conviction counsel were not ineffective, and that he had waived any claims of trial counsel's ineffectiveness. The court held that the Supreme Court's recent opinion in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), could not excuse the procedural default of Mr. Tabler's post-conviction claims, because Mr. Tabler had waived his post-conviction rights, and the only state post-conviction proceeding that had occurred was a competency hearing. In the court's view, *Martinez* did not "extend" to such a proceeding. Moreover, it ruled, Mr. Tabler had not

[2] Ms. Widder has been employed full-time at the Georgia Resource Center in Atlanta, Georgia since October 2012.

established that the underlying claim of trial counsel's ineffectiveness was "substantial." A5-8; *Tabler v. Stephens*, 588 F. App'x at 302-07; A5-8.

8. The Court of Appeals vacated its own order on January 27, 2015, in light of the Supreme Court decision in *Christeson v. Roper*, 135 S.Ct. 891 (Jan. 20, 2015). The Court ruled:

> We now hold that the equitable rule established in *Martinez v. Ryan,* —— U.S. ——–, 132 S.Ct. 1309, 1315, 182 L.Ed.2d 272 (2012), that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," logically extends to ineffective assistance of habeas counsel that prevents an initial-review collateral proceeding from ever taking place. Because Tabler's attorneys for his state habeas proceedings were also his attorneys for his federal habeas proceedings, they faced a conflict of interest that could have prevented them from arguing that their performance in Tabler's competency hearing was deficient, and, accordingly, Tabler's statutory right to counsel was violated. *See Christeson,* 574 U.S. at ——, 135 S.Ct. at ——. We hereby VACATE IN PART the district court's judgment and REMAND the case to the district court solely to consider in the first instance whether Tabler, represented by his new counsel Widder or other unconflicted counsel, can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief.

A17; *Tabler v. Stephens*, 591 F. App'x. 281 (5th Cir. 2015).

9. On remand, this Court appointed the Federal Community Defender for the Eastern District of Pennsylvania as co-counsel to Ms. Widder, and ordered counsel to file "an amended pleading addressing any ineffective assistance of trial counsel claims that he may raise and whether Petitioner can establish cause for the procedural default of those claims pursuant to *Martinez v. Ryan,* 132 S.Ct. 1309 (2012)." Doc. 79.

STATEMENT OF THE CASE

A. Trial Counsel's Preparation for Trial.

10. Robert O. "Buck" Harris II was appointed to represent Mr. Tabler on November 30, 2004, the day after Mr. Tabler's arrest for the murders of Mr. Zayed and Mr. Rahmouni. A47. Although Mr. Tabler had appeared that same day before a Magistrate for the setting of bail, Mr. Harris apparently did not meet with him in the courthouse lockup; instead, he wrote to his new client promising to come see him soon. A49. On Mr. Harris's motion, the court appointed investigator Bob Harrell on January 11, 2005, allocating $500 for his work. A48.

11. On February 16, 2005, a grand jury indicted Mr. Tabler and his co-defendant, Timothy Payne, for capital murder. A45.[3] As a result, in May, the court appointed a second attorney, Russell Hunt, as required by Tex. Stat. Ann. 26.052; a third attorney, Michael White, also entered an appearance. A50-51.

12. On June 2, Mr. Hunt wrote to Mr. Tabler explaining that officials had not brought him to court for a hearing, and describing what had taken place there. A737. On June 8, Mr. Tabler complained to the court that his attorneys had not visited him. A52. In response to the complaint, Mr. Hunt wrote to Mr. Tabler telling him that he would not come see him until he had seen the full file at the District Attorney's office. Mr. Hunt berated his client, calling him "unbelievably stupid" for writing about an incident with another inmate in a letter he should know would be read. A738. Although Hunt briefly visited Mr. Tabler a few weeks later,[4] he did not give him information about the discovery for six months. A103, 106.

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[3] As previously observed, Mr. Tabler was also indicted in Bell County for the shooting deaths of Tiffany Dotson and Amanda Benefield on November 28, 2004, but those charges were dismissed after the capital conviction and death sentence. A83-87.

[4] Mr. Hunt's bill reflects 2.5 hours for the 85-mile round trip from his office to Bell County plus whatever time he actually spent with Mr. Tabler. A61. For each of his client visits,

13. Shortly thereafter, the Court appointed Pamela Stites as a mitigation specialist on Mr. Tabler's two cases for a total of $3,000; $1500 was allocated to this case.[5] A88. Stites obtained various records and met a number of times with the client. But she never conducted any in-person interviews of Mr. Tabler's family, friends, or associates, relying instead on what she learned from the records she collected and from talking to Mr. Tabler. A case outline in Hunt's file, which she apparently prepared, reflects a review of the records but no witness interviews. A740.

14. The defense sought to show that Mr. Tabler suffered from brain damage. Before Ms. Stites had even received permission to visit Mr. Tabler in prison, a registered nurse who shared letterhead with her, Kolbi McCarstle, reviewed some medical records and recommended an electroencephalogram, or EEG. A95. About a month later, on July 27, Stites urgently reiterated that recommendation, on the basis only of record review and interviews of the client. A108. Counsel sought and obtained funding for Dr. Meyer Proler, a neurophysiologist, to conduct an EEG test of Mr. Tabler to determine whether "he has significant brain damage or disease." A technician administered the test in September 2005, and Dr. Proler analyzed the results. A98, A101-02; 28.RR.9. They were abnormal. 28.RR.16; A415. The defense team recognized, as Stites explained in support of a request for funds, that the affected areas of his brain – the frontal and temporal lobes – governed impulse control. A92.

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he billed for no more than 3.3 hours for the combined travel time and visit, and often he also met with the district attorney or visited the clerk's office on the same trip. A65-76.

[5] Ms. Stites is deceased. *See* Obituary, Pamela Turrentine Stites, http://www.legacy.com/obituaries/statesman/obituary.aspx?n=pamela-turrentine-stites&pid=147118596 (visited July 21, 2015).

15. Mr. Hunt wrote to Mr. Tabler, telling him that Dr. Proler's affidavit provided "documented proof" that he had a "brain abnormality," and promising that the defense team was going to use the evidence to try to convince the prosecution to offer a life sentence. A105. Within days, Mr. Tabler had attempted suicide. After learning about it, Mr. Hunt wrote to express regret, but did not make any promises to visit, although his office in Waco was a 45-minute drive from Mr. Tabler's place of incarceration in Benton. A104.

16. In December 2005, Ms. Stites sent an email urging a neuropsychological evaluation, but indicating that her investigation had "stopped dead" for over a month because she had exhausted the funding for her work. A107. In April, she provided more information in support of further funding. She said that she needed more time to obtain, review, and organize records and to attend trial. She did not request funding for witness interviews. A92.

17. The court did not order additional funding for Stites until May 31, 2006, cutting a request for $3570 to $2500. A91.

18. On August 18, 2006, the court granted Mr. Hunt and Ms. Stites permission to withdraw from the case because of a conflict of interest. A53. Following Mr. Hunt's withdrawal, he submitted a final payment voucher that reflected phone calls with Lorraine Tabler (Mr. Tabler's mother), Kristina[6] Martinez (his sister), Robert Tabler (his father), and Paula Brown (a female friend who became acquainted with Mr. Tabler after his arrest). He did not bill for any in-person interviews. A57, A80.

19. The court appointed attorney John Donahue and mitigation investigator Gerald Byington to replace Mr. Hunt and Ms. Stites, and rescheduled the trial for February 12, 2007 (A78-79), giving the new members of the defense team less than five months to conduct a

[6] Although the transcript spells the name of Mr. Tabler's sister "Christina," the correct spelling is "Kristina," and this pleading uses that spelling.

social history investigation. They did not do so. Mr. Byington met Mr. Tabler's mother and sister and may have spoken to his father by phone, but conducted no other interviews. Like Stites, he primarily organized records.

20. On December 18, 2006, Dr. Dineen Milam, a neuropsychologist, conducted a number of tests of Mr. Tabler's functioning. The only background information in the materials she received from trial counsel appeared in a chronology prepared by Mr. Byington, based exclusively on records and a single "statement" by Lorraine Tabler.[7] A416.

21. To assess intellectual functioning, Dr. Milam administered the Reynolds Intellectual Assessment Scales (or RIAS), on which Mr. Tabler scored at the 16th percentile on the verbal subtests but the 88th percentile on nonverbal subtests. On the memory subtests he scored at the 5th percentile. A422. The interpretive narrative provided by the computerized testing software indicated:

> [A] statistically significant discrepancy exists between his [nonverbal index] of 118 and his [verbal index] of 85, demonstrating better developed nonverbal intelligence or spatial abilities. ***The magnitude of the difference observed between these two scores is potentially important and should be considered*** when drawing conclusions about RICHARD's current status. A difference of this size is relatively uncommon, occurring in only 1.60% of cases in the general population. In such cases, interpretation of the CDC or general intelligence score may be of less value than viewing RICHARD's verbal and nonverbal abilities separately.
>
> When compared to RICHARD's measured level of general intelligence . . . it can be seen that his [memory index] falls significantly below his [general intelligence index]. This result indicates a level of working memory skill that is not as well developed as RICHARD's general intelligence at this time. ***The magnitude of the difference seen in this instance may take on special diagnostic significance due to its relative infrequency in the general population.***

[7] The prosecutor demanded a copy of this "statement" during trial and learned that it was not reduced to writing. 27.RR.114-15.

A423. Mr. Tabler achieved impaired scores on several tests in the Halstead-Reitan battery, a series of tests designed to assess brain functioning:

- He demonstrated several learning disabilities – which Dr. Milam described as dyscalculia (math disability), constructional dyspraxia, and auditory verbal dysgnosia – on the aphasia screen test.
- He scored in the mildly- to moderately-impaired range on the seashore rhythm test, which evaluates auditory attention and concentration and the ability to discriminate between non-verbal sounds, and helps detect brain damage.
- He demonstrated mild damage or impairment on the grip strength and finger-tapping tests.

Furthermore, Mr. Tabler scored at only the 6th percentile in arithmetic in the Wide-Range Achievement Test, although he scored at the 42nd and 27th percentiles in reading and spelling. On the Wechsler Memory Scales-III he demonstrated a "really bad comprehension problem," although he had an "excellent" visual memory. A421.

22. Dr. Milam did not write a report or testify at Mr. Tabler's trial.

23. About six weeks before the penalty phase began, in February 2007, psychiatrist Susan Stone[8] interviewed Mr. Tabler for about an hour and a half on behalf of the defense. She reviewed records and Byington's chronology, which was based on records and the unwritten "statement" of Lorraine Tabler, but did not otherwise rely on any witness statements or social history report, or conduct any collateral interviews of her own. 28.RR.30, 50-53. She

[8] Dr. Stone is deceased. *See* Obituary, Susan Stone, Austin American-Statesman, Sept. 11, 2013, http://www.legacy.com/obituaries/statesman/obituary.aspx?pid=166905319 (visited August 2, 2015).

found that Mr. Tabler suffered from severe mental health impairments: attention deficit hyperactivity disorder, bipolar disorder, and a borderline personality disorder.

24. About two weeks before trial, Dr. Deborah Jacobvitz, a child psychologist and professor at the University of Texas at Austin, interviewed Mr. Tabler as part of an evaluation of his developmental history. 28.RR.88-89, 106. After that, she spoke by phone with his mother, father, and sister. 28.RR.109. She did not conduct any in-person interviews except for her meeting with Mr. Tabler. 28.RR.149.

B. Pre-Trial and Trial Proceedings

25. Mr. Tabler stood trial for the November 26, 2004, shooting deaths of Amine Rahmouni, the manager of a strip club called Teazers near Fort Hood, Texas, and his friend Hatham Zayed. Mr. Tabler knew Rahmouni because he had frequented the club. In the penalty phase, the state introduced evidence concerning the unadjudicated killings of two strippers from Teazers named Amanda Benefield and Kim Dotson, who were shot to death two days after the charged offenses. Mr. Payne and his separately tried co-defendant, Timothy Payne, were also charged with their murders, but the State ultimately dropped those charges.

1. Arrest and Confession

26. Within days of the murder of Rahmouni and Zayed, the lead investigator from the Bell County Sheriff's Office, Detective Timothy Steglich, identified Mr. Tabler as the main suspect. 21.RR.40. Through his investigation, Detective Steglich learned that Mr. Tabler had recently been working as a confidential informant for Detective Robert Clemons of the neighboring Killeen police department. *Id.* at 41. Mr. Tabler had agreed to cooperate with Detective Clemons in hopes of obtaining favorable treatment on his outstanding theft charges in Killeen. *Id.* at 8-9, 21.

27. On November 28, 2004, Detective Steglich devised a plan to lure Mr. Tabler into police custody by having Detective Clemons contact Mr. Tabler under the pretext that he wanted Mr. Tabler to make an undercover narcotics purchase. *Id.* at 41. Detective Steglich intended to arrest Mr. Tabler on the outstanding theft charges, hold him in custody, and then question Mr. Tabler about the homicides. *Id.*

28. Detective Clemons arranged for Mr. Tabler to meet him at the Killeen police department. Before Mr. Tabler arrived, the police set up video equipment to record their interactions with Mr. Tabler. 26.RR.164. Mr. Tabler arrived at the Killeen police department at approximately 9:00 p.m. and advised Detective Clemons that he had arranged to purchase cocaine and pills from Chris Elston. While waiting for the time and location of the drug sale to be finalized, Detective Clemons asked Mr. Tabler whether he knew or had heard anything about the murder of Amine and if he knew the other victim, Zayed. *See Video* at 2:37 (The videotape was introduced by the State at sentencing as Exhibit 114; 26.RR.164). Mr. Tabler denied knowledge of the murders or Zayed but Detective Clemons pressed him for more information and asked why Mr. Tabler had stopped hanging out at Teazers. Mr. Tabler explained that he had been kicked out of Teazers and told not to return. *Videotape* at 2:38-4:07.

29. Shortly after this discussion, police arrested Mr. Tabler on the outstanding theft charges. *Video* at 14:04; 21.RR.11. As he was being placed in handcuffs, Mr. Tabler requested to speak with Detective Clemons alone. Mr. Tabler told Detective Clemons he could give him information about who killed Amine and told him that a man he knew only as "Tim" had bragged about the killing. *Video* at 14:55; 21.RR.12-13.

30. Detective Clemons began to press Mr. Tabler for more details and advised him that he would need to verify the information about Tim before he could release Mr. Tabler or otherwise help him out on the theft charges. *Video* at 19:36-21:20. For the remainder of Mr. Tabler's time at the Killeen police department, Detective Clemons pretended to make efforts with the district attorney's office to obtain Mr. Tabler's release in exchange for his information on the murder charges. *Video* at 21:20-end.

31. Detective Clemons informed Mr. Tabler that he would have to be transported to the Bell County Sheriff's office to provide a statement about the murders before he could be released, and then advised him of his *Miranda* rights. *Video* at 53:52; 21.RR.15. On the way to the Bell County Sheriff's Office, detectives stopped at the crime scene where the bodies of two young women had just been discovered, to see if it affected Mr. Tabler's demeanor. 21.RR.27 He did not react in any significant manner and they continued to Bell County. *Id.*

32. Detectives Steglich and Clemons began their questioning of Mr. Tabler at the Bell County Sheriff's Office at approximately 11:00 p.m. A139, *Investigation Report* at 31. They made no arrangements to videotape their interview of Mr. Tabler and audiotaped only thirty minutes of the six-hour interrogation. A187-89. In his first statement at Bell County, Mr. Tabler reiterated that he had not been involved in the shootings and only knew about them from his conversations with Mr. Payne. A485. Apparently not satisfied with this explanation, Detectives Steglich and Clemons pressed Mr. Tabler to be "forthcoming" and Mr. Tabler provided another statement wherein he admitted being present during the shooting but insisted that Mr. Payne was the shooter. A487. It is a thirty minute segment of this second statement at Bell County that is reflected on the audio recording. *See Audio Recording*.

33. After this statement, at 3:45 a.m and eight hours after Mr. Tabler's arrest, Detectives Clemons and Steglich took turns standing a foot in front of Mr. Tabler who was "wearing down rapidly" and "got in his face" until Mr. Tabler, who was stammering and almost crying, confessed to all four of the murders. 21.RR.60-62.

2. The Motion to Suppress

34. Prior to trial, counsel filed a motion to suppress Mr. Tabler's statements, and the court held a hearing on this motion on March 19, 2007. Counsel moved to suppress the statements only on the ground that they were the fruit of Mr. Tabler's unlawful, warrantless arrest. 21.RR.75.

35. The State presented the testimony of Detectives Clemons and Steglich. Detective Clemons testified that at the time Mr. Tabler was arrested, he believed that the warrant on the theft charges had been signed by a judge. 21.RR.11. He denied that he and Detective Steglich utilized any physical or emotional intimidation during the interrogation at Bell County. 21.RR.28.

36. Detective Steglich contradicted Clemons's testimony and stated he had not obtained a valid warrant at the time of Tabler's arrest and had instructed Detective Clemons to arrest Mr. Tabler as a flight risk. 21.RR.42-44. Detective Steglich admitted that he and Detective Clemons utilized intimidation tactics to obtain the final statement. 21.RR.60-62.

37. The defense recalled Detective Clemons as their only witness and briefly questioned him about Mr. Tabler's designation as a flight risk. 21.RR.69-72. Neither the State nor the defense introduced the videotape or partial audio recording of the statements. The Court heard argument from both sides and promptly denied the motion to suppress. 21.RR.81. In its Findings of Fact and Conclusions of Law, dated October 26, 2009, the court found that the statements were not the product of an unlawful arrest.

3. The Guilt-Innocence Trial

38. After briefly explaining to the jury that they would hear evidence about a murder scene, Mr. McWilliams told the jury that Richard Lee Tabler "in his own words" and "in black and white" confessed to the murders and so, "we will be finished pretty quickly with the reasonable doubt phase of this case." 22.RR.15.

39. The State presented several individuals who were the first responders to the murder scene. Elda Davila, a gatekeeper at Fort Hood, discovered the bodies at 4:30 a.m. as she arrived for work. 22.RR.4. She described two male victims lying on either side of a white Mitsubishi Eclipse. 22.RR.25. Members of the Killeen police department and the Bell County Sheriff's office arrived, processed the scene, and collected evidence. *Id.* at 26. Crime scene investigators recovered various pieces of ballistic material including a projectile next to the driver's seat, and three 9mm shell casings on the ground near the car. *Id.* at 58, 73.

40. The medical examiner testified that Mr. Rahmouni sustained three gunshot wounds: to the face, head and hand. 23 RR 12-13. Mr. Zayed was killed by one shot to the head area. *Id.* at 7.

41. Various friends of the victims explained the events of the evening of November 25 into the morning of November 26. 23.RR.35 (Sonia Ilang aka Sonia Martinez), 67 (Bob Shofner), 75 (David Cox). Mr. Rahmouni along with his girlfriend, Sonia Ilang, and Mr. Zayed patronized various local nightclubs. *Id.* at 41. Throughout the evening, Ms. Ilang observed Mr. Rahmouni speaking on his cell phone. *Id.* at 42. Although she did not know who he was speaking with she became aware that he and Mr. Zayed were leaving to purchase stereo equipment. *Id.* at 55. Mr. Shofner and Mr. Cox testified that Mr. Zayed contacted them in the early morning hours of November 26 and arranged to get fifteen hundred dollars from them.

42. The State called various friends of Mr. Tabler and Mr. Payne who had contact with them in the days leading up to the murder. Ms. Wendy Jiminez testified that she loaned Mr. Tabler her silver Dodge Ram pickup truck on Thanksgiving weekend and he did not return it until the day after the holiday. 23.RR.90-91.

43. Chris Elston, who was stationed at Fort Hood at the time of the murders, was friends with both Timothy Payne and Richard Tabler. 23.RR.144-145. On the evening of November 25, 2004, Mr. Tabler signed him out, and he went to the house of Mr. Tabler's girlfriend, Kimberly Geary (aka Kimberly Marmie), along with Tim Payne and others, where they began drinking and using drugs. *Id.* at 149. Later in the evening Mr. Elston left Kim's house with Mr. Tabler and Mr. Payne to look for Amine because he believed Amine owed Mr. Tabler money and the group was eager to collect this money so they could purchase more drugs. *Id.*

44. Kimberly Geary, who had been dating Mr. Tabler at the time of the murders, corroborated Mr. Elston's testimony about the events of Thanksgiving evening; however, she denied that she used any drugs. 23.RR.161-162. She was awakened at some point in the early morning hours of the 26th by Mr. Payne and Mr. Tabler. *Id.* at 164. Mr. Tabler told her that he had "just killed two guys" and showed her a videotape (which Mr. Tabler later burned outside her residence) which she described as showing Mr. Tabler shooting the "passenger" and shouting "who has the power now." *Id.* at 165-168. She described Mr. Tabler's demeanor when he was showing her the videotape as "normal," but indicated that Mr. Payne, who was covered in blood, appeared agitated and "just seemed to be doing as he was told." *Id.* at 167, 179. The following Sunday, police came to her house and she allowed them to search the premises. *Id.* at 170. Detective Wayne McGlothlin told the jury that Timothy Payne was

present when police arrived and directed police to a 9mm weapon in a car in the garage. *Id.* at 200-202.

45. Ron Crumley, a firearm and toolmark examiner for Texas Department of Public Safety, examined the 9mm weapon recovered from Ms. Geary's house as well as the ballistic material recovered at the scene of the murder and determined that the projectiles and shell casings were all fired by the 9mm weapon. 23.RR.123, 134.

46. Detectives Steglich and Clemons testified consistently with their testimony at the motion to suppress as to the interrogation they conducted of Mr. Tabler on November 28, 2004. 23.RR.183 (Clemons), 203 (Steglich). In his first two statements, Mr. Tabler told police that he only knew about the murders because a guy he knew only as "Tim" had bragged about committing them. *See Videotape* at 15:54; A485. In his third statement to police, Mr. Tabler admitted that he was present during the killings but said that Tim had shot both men. A487. In his final statement, Mr. Tabler told police that he shot Amine and Frank because Amine had threatened to wipe out his whole family for ten dollars. A489.

47. Finally, the State introduced the cell phone records belonging to Mr. Tabler and then rested. 24.RR.4.

48. The defense did not present an opening statement, called no witnesses, did not introduce any exhibits, and rested. 24.RR.5.

49. In both of their closing arguments the attorneys for the State focused on the fact that Mr. Tabler had confessed and that his confession was consistent with the photographs and the other evidence. Ms. McWilliams told the jury that there were "five exhibits that answer the question of guilt definitively" and that the photographs and exhibits corroborated what Mr. Tabler said in his confession. 24.RR.24. She maintained that the defense could not tell the

jurors why the confessions and the evidence did not prove Mr. Tabler's guilt "beyond any doubt whatsoever." 24.RR.24-25. In rebuttal argument, Mr. McWilliams told the jury that Mr. Tabler was a "talker" and it did not matter whether anyone found fingerprints on the gun, because Tabler *said* he used that gun to kill the victims. 24.RR.44-45. He then told the jury, "I have every confidence you will make the right decision and it's not going to take you long." 24.RR.50.

50. The defense closing – presented by Mr. Harris – began with a long apology to the family of the victims. While apparently referring to a picture of the victim, he told the jury that this picture is "gory and ugly and not the last memory this wonderful group of people should have of this young man." 24.RR.29. Counsel then began a bizarre and incoherent discussion of topics consisting mainly of confusing metaphors, such as "trying a case is like painting on the canvas." 24.RR.33. He told the jurors that the state had attempted to place Tabler "into the center of the picture" but that the jury should also see the victims and Tim Payne in that picture because "they all existed in the same world." 24.RR.33. Counsel concluded by again addressing the innocence of the victims, maintaining that "they didn't do anything wrong" and not a single act that the victims committed should have gotten them killed. 24.RR.38-39.

51. The jurors began their deliberations at 11:00 a.m. and returned with a verdict of capital murder against Mr. Tabler at 1:30 p.m. 24.RR.51-52.

4. The Penalty Phase of Trial

52. The prosecution focused on two main themes in its penalty phase case-in-chief: it introduced numerous unadjudicated bad acts to support an argument that Mr. Tabler would present a future danger, and it introduced vivid testimony by family members detailing the life

stories, not of Mr. Zayed and Mr. Rahmouni (for whose homicides Mr. Tabler was on trial) but of the two young women killed two days later.

53. The jurors heard about the following incidents:

- In Modesto, California, Mr. Tabler resisted arrest by his parole officer, escaped from a patrol car, and threatened the parole officer. 25.RR.10, 25.RR.30.
- Mr. Tabler drove from Michigan to California with a young woman whose parents later discovered that a black duffle bag containing a handgun was missing. Mr. Tabler threatened the officer who called his cell phone to ask about the gun. 25.RR.40-45.
- In Bell County, Texas, Mr. Tabler threatened a jailer. 25.RR.55-56, 63, 25.RR.70-71.
- The jail administrator for Bell County testified that he had placed Mr. Tabler in isolation. Mr. Tabler had committed infractions and had cut himself repeatedly, one time "fairly serious[ly]." 25.RR.79-86.
- The phone receptionist at the Bell County Sheriff's Office received several anonymous calls on the night of the murders of the two men. The caller described the murders, and threatened to commit another double murder and to "pick off" undercover officers at the Teazers strip club. 26.RR.7-10.

54. The prosecution introduced detailed evidence about the unadjudicated homicides of two Teazer's dancers, Amanda Benefield and Tiffany Dotson, two days after Zayed and Rahmouni were killed. The dispatcher at the Bell County Sheriff's Office received a call on November 28, 2004, from a man who announced another murder and threatened to "kill them all" if Teazers was not shut down. 26.RR.32-34. The jurors saw a videotape of the crime scene and heard a description of the recovery of the bodies. 26.RR.41, 26.RR.55. The medical examiner described each young woman's wounds and cause of death. 26.RR.88-106.

Both had cocaine or its metabolites in their systems. 26.RR.107-09. A ballistics expert concluded that bullets fired from the same gun had killed the two men and the two young women. 26.RR.136.

55. Kim Geary testified that Mr. Tabler had told her that he had shot the young women because they had been telling people that he had shot Zayed and Rahmouni. 26.RR.141. She acknowledged on cross-examination that Mr. Tabler also told her that Amine Rahmouni had been threatening his mother and sister, and that Mr. Tabler's behavior was "bizarre even without the murders." 26.RR.150, 154. Detective Robert Clemons described how he lured Mr. Tabler into custody by asking him to come to the Bell County Sheriff's Office to set up an undercover drug buy. 26.RR.156. The prosecution played the videotape of Mr. Tabler's custodial statement about the killings of the two young women. 26.RR.163-66. The prosecution's chief investigator testified that Mr. Tabler had a list of additional people he was going to "get." 26.RR.170-77.

56. A.P. Merillat worked for an independent agency, funded by the Governor's office, that prosecuted and kept statistics on prison crimes committed by both inmates and staff. 27.RR.1215. The state called him to establish "the opportunity if anyone wants to avail themselves of it to engage in criminal acts of violence." 27.RR.7. Merillat described the classification process that made it possible for a life-sentenced inmate to achieve general population custody status within ten years of sentencing. 27.RR.12-21. His unit had investigated 145 murders within the prison system since 1984, had prosecuted 81 life-sentenced capital murderers for felonies, and had prosecuted death row inmates. 27.RR.26.

57. The jurors heard from relatives of Amanda Benefield and Tiffany Dotson about their personal bonds, life histories, and struggles. Carroll Vaughn, Amanda Benefield's

grandmother, described her granddaughter's "horrible" life. Her mother killed her father in self-defense; her stepfather raped her and left her for dead in a tub full of blood; she was nevertheless a "happy girl" who "loved life." 26.RR.64-71. Mary Dotson, Tiffany Dotson's stepmother, raised Tiffany and her sister because their biological mother was incarcerated. She taught Tiffany to read, and described her as "the love of our life." 26.RR.76-78.

58. Trial counsel Harris promised the jury in his opening, consistently with the strategy that was evident in the records created before trial, that the defense would demonstrate that Mr. Tabler was not "normal." 27.RR.69. In contrast to the detailed firsthand evidence presented through the state's witnesses, the testimony for the defense comprised vague summaries provided by Mr. Tabler's mother and sister and expert testimony based primarily on records review.

59. Mr. Tabler's mother, Lorraine Tabler, described her troubled marriage and the many changes in her own living circumstances during her son Richard's[9] childhood and youth. When she became pregnant with Richard, her husband Robert told her to have an abortion, but she refused. 27.RR.79. Lorraine described Robert as a father who "did not take much interest in Richard," spent a lot of time out "partying," and had affairs. 27.RR.73-76, 75-79. When Richard was an infant, she cared for other infants in her home, and she returned to work when Richard was a year old, leaving him in the care of his seven-year-old sister Kristina and nine-year-old half-brother Sean. 27.RR.81, 132. When Richard was about in third grade, Lorraine decided to leave. No one told Richard or the other children about her planned departure until she was pulling out of the driveway. She rebuffed Richard's pleas to take him with her. 27.RR.86-87. After that, Lorraine at first lived nearby in California, then two hours away, then

[9] Here and wherever necessary for clarity throughout, this pleading will refer to Mr. Tabler and his immediate family by first name.

returned to Robert for a few months, then moved to Florida and to Las Vegas, then back to Florida, and finally to Texas. At some points during his adolescence Richard lived with her, but most of the time he lived at his father's house. 27.RR.87-109.

60. Lorraine testified that Richard was born blue, with "fluid in his lungs." 27.RR.79. She did not describe his development or behavior as a small child. Her only description of his school years implied willful misbehavior: he "had problems in school" because he "did not want to pay attention." 27.RR.83-84. Lorraine provided general descriptions of Richard's behavior as an adolescent, but they focused on his noncompliance with her own parental guidance. When he lived with her in Florida in his early teens, he would get "upset" if "you put too many restrictions on him." 27.RR.94. "He will be good for a while and then he blows up." 27.RR.96. Later, when Richard spent some time living with her in Las Vegas, he had "a tendency to run" when she told him he had to go to school or "tow [sic] the line and stuff[.]" 27.RR.98. Richard was "very impulsive," in that "if he has a dollar he will find a way to spend it." Lorraine's only acknowledgement of behavior that was not typical of many teens was her report that Richard had been cutting himself for a few years. 27.RR.106. She mentioned that, when Richard was living with her in Florida in his early teens, he once fell out of a tree, was knocked unconscious, and was treated at the emergency room. 27.RR.95.

61. Kristina Martinez, Richard's sister, was seven years old when he was born. 27.RR.122. Although she thought that Richard was "not normal" (27.RR.124), she described him in a manner typical of older siblings describing their younger siblings. Richard "always needed love and attention"; when Richard got home from day care, Kristina would have to help take care of him because both parents were never home at the same time; while growing up she considered him a "pest" because he would "always have to be around me." 27.RR.124-28. It

had always been "hard for Richard to control his emotions"; for example, when he was still in a high chair he could hold his breath until he passed out if he did not get his way. 27.RR.130. His only friend was a boy named Adam, whose parents could accept Richard's "tantrums." 27.RR.130. He could be "upset" one minute, and apologetic and loving the next. 27.RR.141.

62. When Richard reached school age, he had trouble because he could not sit still or focus, and eventually he received a diagnosis of Attention Deficit Hyperactivity Disorder (or ADHD). 27.RR.137, 142. He was treated for a head injury he received when he fell out of a tree in Florida. 27.RR.144.

63. Aside from these two family witnesses, the defense relied on some of the mental health experts who had evaluated Mr. Tabler before trial. Dr. Meyer Proler, the clinical neurophysiologist, interpreted the EEG and found:

> The major abnormality described was a -- what we call "a focus," an area of brain that showed up as an abnormality because of the presence of low frequency or slow activity that should not be there in a normal individual. It was in the left frontal or left frontal temporal area. . . It is more than likely damage. Since we did not do any further studies, the EEG can't give 100% information, but it does -- it reflects an abnormality.

28.RR.16-17. He described the frontal lobes as "the part of the brain that makes us particularly human," because they give us the ability to predict and plan, and to understand not only the meanings of words but their emotional content. 28.RR.17.

64. On cross-examination, the prosecutor attacked Dr. Proler's conclusions because his report had described, not only his qualitative reading of the EEG results, but also a then-novel form of quantitative analysis of the results that he had not mentioned in his direct examination. 28.RR.21. Although Dr. Proler indicated that he had first evaluated the EEG with his "naked eye" – and the prosecution did not elicit anything inadmissible about his conclusions from that initial review – he acknowledged that the quantitative portion of his

analysis was "probably not admissible." He also acknowledged that he would require "further studies" to "find out what this slow-wave thing was." 28.RR.25. Although trial counsel pressed him on re-direct examination to say whether Mr. Tabler had "brain damage," he testified that he could not do so on the basis of the EEG alone. 28.RR.27.

65. Dr. Susan Stone, the psychiatrist (who was also an attorney), testified that Mr. Tabler "was raised in a very neglectful household with very turbulent parents who were consistently abandoning and neglecting him." 28.RR.32. She recounted the diagnoses reflected in the records she had reviewed. Mr. Tabler was diagnosed as an adolescent with a "pretty severe case" of ADHD, which caused difficulties with impulse control and his ability to rationally assess circumstances. 28.RR.32. While he was in the California prison system, he received a diagnosis of bipolar disorder, "which was serious enough that it required him to be hospitalized numerous times[.]" 28.RR.32-33. Dr. Stone concluded that, in addition to these "biologic" conditions, Mr. Tabler also suffered from a "characterologic" disorder, borderline personality disorder; she based her conclusion on his lack of "boundaries" and his unstable relationships, attention-seeking behavior, suicide gestures, self-mutilation, and impulsivity. 28.RR.33. In addition, Mr. Tabler had "a history of head injury, several times," one of which occurred "at a young age and several others later on." 28.RR.34. The combination of these problems "resulted in a real inability for him to rationally assess situations and to use good judgment, to abstract from his mistakes and to control his impulses." *Id.*

66. Dr. Stone acknowledged on cross-examination that, for background information, she had received only "what is basically an outline" (the Byington chronology), and had not received any statement from Lorraine Tabler. She did not speak to Lorraine Tabler, Robert Tabler, or Kristina Martinez. 28.RR.53. She had based her opinion that Mr.

Tabler suffers from ADHD on the diagnosis reflected in the mental health records, but acknowledged that no such diagnosis appeared anywhere in the school records she had reviewed. 28.RR.63. The mental health records, moreover, reflected what appeared to be an inaccurate report by Lorraine Tabler that Richard Tabler had repeated third grade; the school records showed that he had been promoted from third grade to fourth. 28.RR.59-61.

67. Dr. Stone initially testified that Mr. Tabler did not suffer from antisocial personality disorder (ASPD) because she had not seen any evidence of conduct disorder before age fifteen (one of the necessary criteria for ASPD). 28.RR.43. On cross-examination, however, she admitted that the records she had reviewed included a diagnosis of conduct disorder and several diagnoses of ASPD. Mr. Tabler had received multiple diagnoses from a variety of treating experts. 28.RR.67-78. Dr. Stone did not believe the conduct disorder or ASPD diagnoses appropriate in a case, like Mr. Tabler's, in which "biologic" impairments can explain the antisocial behaviors. 28.RR.82.

68. The defense presentation concluded with the testimony of Dr. Jacobvitz. She identified several factors that prevented Richard from developing normally: Robert Tabler's uncaring attitude, exemplified by his demand that Lorraine get an abortion while she was carrying Richard (28.RR.100); Lorraine Tabler's emotional unavailability, exemplified by her caring for infants in her home while Richard himself was an infant (28.RR.113); the major care responsibility placed on his sister Kristina, who was only seven years old when he was born, and the impact of Kristina's growing independence from home after she reached high school (28.RR.114, 28.RR.116); the separation of Richard's parents when he was about nine (28.RR.119); his father's failure to get him psychiatric help until he was about age fifteen

(28.RR.127-28). Dr. Jacobvitz testified that she administered a standardized adult attachment interview, but counsel did not ask her to describe the results to the jurors. 28.RR.121-23.

69. On cross-examination, Dr. Jacobvitz acknowledged that she had not verified various statements Mr. Tabler had made to her. 28.RR.135-39. She also acknowledged that portions of a letter from Robert Tabler to Richard, indicating that the father continued to provide financial support to the son when he "kicked him out," and urged him to take responsibility and behave like an adult, contained some expressions of concern. 28.RR.140-42.

70. The defense rested after Dr. Jacobvitz's testimony. 28.RR.149. In rebuttal, the state called Richard E. Coons, M.D., a psychiatrist, who diagnosed Mr. Tabler as having an antisocial personality and attention deficit hyperactivity disorder. 28.RR.157. Those diagnosed with ASPD could have "comorbid" diagnoses of ADHD or borderline personality disorder, but Dr. Coons felt confident that ASPD was Mr. Tabler's "primary" diagnosis. 28.RR.161-62, 165. He viewed the abnormal EEG as a "red herring" because

> Posterior frontal anterior temporal lobe lesions generally have the people can't read and write very well and so forth. He's a prolific writer and, you know, has written a zillion letters and so forth, a good many of which I've read and they all make sense.

28.RR.177. Dr. Coons was not asked about other conditions that might account for the abnormal EEG. He dismissed Mr. Tabler's self-cutting and multiple suicide attempts, including one where he may have been trying to pull a vein out of his arm, as "gestures." 28.RR.179-81.

> If a man wants to kill himself, he could kill himself. . . . Women often take pills and they're not very good at it. But if a man wants to kill himself, he can hang himself, he can shoot himself, he can whatever.

28.RR.179.

71. Both Mr. Harris and Mr. Donahue presented summation arguments. Mr. Harris argued that Richard Tabler was a "flawed" person whose "soul was probably broken before he

was born." 29.RR.17. He described Lorraine Tabler as a "demon" and attacked Robert and Sean Tabler for not attending the trial. 29.RR.20, 23. Abandoning the evidence the defense had presented – showing that Mr. Tabler had brain damage, a borderline personality disorder, and ADHD – he maintained that "this man is antisocial," that a "litany" of "fourteen things" "fit him like a glove," and that the abnormal EEG exam "in all likelihood means he is a sociopath," but that this was a "medical condition." 29.RR.19, 22. According to Mr. Donahue, Richard Tabler was a "boy who basically from the beginning people can tell has problems." 29.RR.28. Mr. Tabler had the "classic symptoms" of ASPD, but he "could not control" his impulses to lie, steal, or cheat. 29.RR.30-31.

72. In his summation, the prosecutor ridiculed defense counsel for changing their mental health theories in mid-stream and failing to keep their promise to "explain" Mr. Tabler's behavior. 29.RR.36-39, 41-60. He argued, on the basis of the detailed evidence of Mr. Tabler's prior violent acts and repeated instances of threatening behavior, that he would present a danger to others in the future. The defense had not argued, and could not argue, that Mr. Tabler would not be a future danger even in prison. 29.RR.40-41.

73. After deliberating for three hours, the jurors returned a verdict requiring imposition of the death penalty. 29.RR.60-61.

C. State Habeas Proceedings

74. On April 24, 2007, the trial court appointed Mr. Tabler his counsel for his direct appeal and state habeas proceedings. David A. Schulman, an Austin attorney, was appointed to represent Mr. Tabler in his state habeas proceedings.

1. "Communication Problems": April 2007 – December 2007

75. Schulman's relationship with his client got off to a rocky start because of "communication problems." Seven weeks after his appointment, Schulman finally made plans

to visit Mr. Tabler for the first time. But when the day came, June 12, 2007, he missed his appointment. In a letter explaining his absence to prison officials, Schulman stated that he got caught in a traffic jam and decided not to go. A192. Schulman relied on the officials to explain his absence to his waiting clients. *Id.* Two days later, Mr. Tabler wrote Schulman:

> In your letter you stated that you were planning on visiting two days ago . . . . I'm willing to accept that you have other cases, and I'm sure you'll tell me something. In all honesty I really don't care what you say to cover the situation that permitted [sic – prevented] you from coming. . . . Next time you claim in advance to be here make sure you are!

A194.

76. Schulman rescheduled his visit and saw his client for the first time on June 26, 2007. That introductory visit would also be Schulman's *last* visit with his client for the next fifteen months. Schulman never saw his client again until September 30, 2008, when he attended the hearing on waiver at the Bell County Courthouse. A196

77. On July 9, 2007, Richard Tabler wrote to Schulman and Jasuta informing them of his desire to waive:

> I'm sorry to inform the both of you but, I've had a change of heart.
>
> I don't wish to spend my life in prison, nor do I wish to sit on Death Row! I've sent my direct appeals attorney Mrs. Krug the same letter. Please understand my actions and respect what I'm asking.
>
> Please withdraw all my appeals a.s.a.p. [...] my wish is to be free and the only way to do that is to get this situation over with. Plus I don't wish for my family to see me this way! This is really a no-win situation and a waste of your time. I have no regrets for my actions! Thanks for your time!

A204.

78. On July 16, direct appeal counsel Karyl Krug's response explained Tabler's legal situation: "you can volunteer once the direct appeal is concluded, but not before." At the same time, Krug tried to persuade her client that there were many good reasons not to waive:

> It has been my experience that most people are not as bad as the worst thing they have ever done . . . . You are a young man and there may be value in the time you have left, however long that may be. David Schulman and I had a client, Emerson Rudd, who became a remarkable artist and poet while on Death Row. He was just a beautiful soul. . . . ¶ I think it unlikely that your family would prefer to see you dead. No mother would ever want that.

A205. But Schulman struck a different note in his July 23 letter to Mr. Tabler. He reiterated Krug's legal position: "The reality is that you will be with us until your direct appeal is over. After that, presuming your appeal is not successful, you can choose not to take further steps to obtain relief." A208. But he posed no objection to his client's desire to waive:

> I am saddened by your last message, but understand completely what you are feeling and what you want to do. Accordingly, presuming you are still of a mind to stop the habeas application, I will do so when the time is appropriate. It is not now, however, that time. . . .

79. Karyl Krug's letter provoked a dramatic change of heart. On July 26, Tabler wrote to inform Schulman that he "had some time to think about what I had requested," "had a change of thought," and would be "okay with riding this thing out all the way to the . . . end with you and John!" A209. He stated, "I guess that I just had a lot on my plate to deal with and I only wanted to go ahead and end fast. You understand what im saying right?" *Id.* Mr. Tabler began writing Schulman with renewed focus on aiding the development of his case. For example, on August 15, 2007, he wrote Schulman about his history of mental illness:

> When I was going to trial my attorney's did NOT place into eveden (sic - evidence) that I had a history of 'mental illness'
>
> . . . .
>
> Also while I was in the county jail I tried to take my own life and was rushed to two hospitals for surgery and a blood transfussion, Yet no-one even showed the jury that[.] (Scott and White Hospital wanted me sent to a mental hospital for serious help!)
>
> *I honestly feel that I need serious medical help with my problems*[.] [A]s you may see I do have a problem with mental illnesses as well as (Frontal Lobe Brain

> Damage), but yet that I was told was not mitigating evidence nor could it help my case in beating the death penalty!

A210. Schulman never responded to this letter. On September 26, Mr. Tabler wrote again, noting that "it's been a while since I've heard from you or [received] a response from my last letter." In the hope of moving his case forward, Tabler had "serious" requests that Schulman "file for an 'evidentiary hearing' a.s.a.p." and "file a 'Bill of Exception's' to enter these documents into records a.s.a.p." A211. Schulman again had no response, instead sending an October 16 note that he had been "tied up" since mid-September and promised, "I will read and respond to all of your communications next week." A212. He never did. Mr. Tabler wrote yet again on November 29, exasperated by the "communication problems," but enthusiastic about his case. A213. He noted that "many people want me off death row a.s.a.p.[—]I myself am one" and re-urged Schulman "to use this time to get ahead and file what needs to be filed now!" A213.

80. Finally, on December 4, Schulman belatedly explained his extended absence in a letter to his client:

> [I] must first apologize for not writing back sooner. . . . There is no good excused [sic]. What has happened is that, for the first time in years, I actually took some time off completely away from the office. John [Jasuta] and I went to a writing conference in Ithaca[,] New York at the end of September, the[n] we attended a criminal law conference with our families and spent additional days vacationing. When I returned from these two trips, I had three days here in Austin then drove to Arizona with a friend for a reunion . . . . By the time I returned, I had been out of the office for 18 work days out of 20 – and there was a backlog of mail and related work you wouldn't believe. The reality is that I'm still not caught up.

A215.

81. Mr. Tabler's letters took a strange turn in late December 2007. On Christmas Day, Mr. Tabler wrote to Schulman with an unbelievable tale and an urgent request:

> May this letter find you doing well and Blessed! I pray you had a good Christmas today? Happy New Year to you! . . . I'm not sure if you can help or not but, I've been having some problems in here and am in "FEAR" for my life! Could you please call here and speak to only Warden Simmons and let him know that I've been threatened by Major Smith, Captain Laycox and Lt. Duff, and need to speak to Mr. Simmons alone please? It started with my mail being held onto, out going and incoming. Now it's being denied meals, recreation and showers along with them trying to keep me on level-2 for 4-months. Please look into this a.s.a.p. Thank you!
>
> Sincerely,
>
> Blue
>
> P.S.
> I feel that their [sic]
> doing this 'cause I
> refuse to help them
> as a snitch about
> some cell phones.

A217. Schulman told his client he would not act on this urgent request. A219 ("Regarding your difficulties with Major Smith and staff, I have found that TDCJ wardens rarely respond to my complaints about problems between my client and unit staff and have found that my inquiries sometimes have made situations worse. If you still want me to write Warden Simmons, let me know and I'll do so. Alternatively, you can write Senior Warden Simmons directly, but I don't know what good that will do."). On January 3, 2008, Mr. Tabler wrote Schulman with another strange request: "the District Attorneys lied to the people in the Jury by saying that 'this 9mm hand gun was the weapon used to kill these people . . . .' Now, Mr. Schulman, I'll show you and the people the 'Truth. . . . I . . . ask that you file a copy [of this letter] with the state habeas appeal.'" A220. Schulman wrote his old law partner and direct appeal counsel Karyl Krug, sharing the letter: "[L]et me know what you think. I think he's way delusional." A226. Again, Schulman did not respond to his client's letter. In fact, he did not write him again for another two months.

2. "Preliminary Services": December 2007 – April 2008

82. When Schulman finally contacted his client again on March 14, 2008, it was to update him on the status of his state habeas investigation: "Although I haven't written in a while, we have been moving forward with your case." A227. Schulman informed Mr. Tabler that he had copied the record and retained Beth Larsen as a mitigation specialist." *Id.* Schulman requested "a list of everyone (family and/or friends) who might have been able to provide and/or still can provide, evidence about your background / mental health / personal history." *Id.*

83. To that point, Schulman had taken some initial steps for a preliminary investigation. He had received the voluntary assistance of Alma Lagarda, an attorney with the Texas Defender Service. Ms. Lagarda offered to interview Mr. Tabler and prepare a memo regarding his social history, records for counsel to request, and general information about the case. A228-29. Besides this limited investigative help, Ms. Lagarda also offered TDS attorneys' ongoing consultation on the case. A229. Ms. Lagarda explained the rationale behind helping Schulman get his investigation off the ground:

> Since the passage of the Anti-Terrorism and Effective Death Penalty Act, the state habeas proceeding has become, in many ways, the most important and difficult stage of appellate proceedings. It is the first and often the last state court opportunity to raise non-record claims likely to result in relief, such as juror misconduct, prosecutorial misconduct, non-disclosure and suppression of evidence, and ineffective assistance of counsel. When these claims are not fully investigated and pled in the first state habeas petition, they are often barred from federal court review.

Ms. Lagarda visited Mr. Tabler, and provided Mr. Schulman a 13-page report. A230. The report contained detailed information about family, health history, witnesses who testified at the trial, individuals who did not testify but who might have helped Mr. Tabler's case, and so on.

84. On October 29, 2007, Schulman filed an *ex parte* motion seeking funds for the "preliminary services" of an investigator and mitigation specialist. A243. On January 11, 2008, he renewed this request and identified his investigator as trial team investigator Rick Ojeda and mitigation specialist as Beth Ann Larsen. A246. In fact, prior to hiring Ms. Larsen, Schulman had tried to hire the mitigation specialist employed by the trial team, Gerald Byington. Byington told Schulman this was a blatant conflict of interest "as basically I would be reviewing my own work." A247. Schulman protested: "Actually, because there is no such claim as ineffective assistance of mitigation specialist," there would be no conflict. "Our thought was that, since you are already familiar with the case, you would not have to 'reinvent the wheel,' and could pick up where you left off." A249. Schulman arranged to meet Mr. Ojeda on February 5, 2008, the day the trial court granted Schulman's funding requests. A251. But Ojeda had the same problem as Byington: "Byington said he and [TDS attorney] John Niland discussed the case and I was not allowed to work on the case because I was conflicted out since I did the original case. Any truth to this?" A255.

85. In February 2008, Beth Larsen began her "preliminary services." She had not worked a post-conviction case before and informed Schulman in an email that she was learning on her feet: "I'm totally clear on what to do when I get a new case but this one is a bit foggy for me. There's so much material and I'm not sure what I'm supposed to be doing." A1017. Schulman instructed her to prepare "an initial report, setting out preliminary conclusions and proposed work to be done, so I can go back to Judge Trudo and ask for more money." A256. The general timeline was to complete investigation and writing for the application by October 17th, the earliest possible date the application was due. *Id.* (laying out the basis for this calculation). Schulman disclaimed responsibility for directing the investigation, however:

"The proposal [for more money] will be my responsibility, but ascertaining what work must be done is something you and Rick will have to tell us."

86. Many preliminary tasks remained undone. Schulman still lacked the files of trial counsel Bucky Harris, John Donahue, and Jack Holmes (though he had received a small file from pre-trial counsel Russ Hunt). A264; A261; A258. Even though trial counsel made their respective files available to state habeas counsel, Mr. Schulman and Mr. Jasuta never obtained their files. Nor had Schulman followed up on getting records from any of the dozens of individuals mentioned in Alma Lagarda's report, let alone contacting them. On March 31, Schulman reported to his client that he still had not attempted read the record and had no intention of doing so "until after I get the initial report from my mitigation specialist and investigator." A267.

87. On March 10, 2008, Beth Larsen wrote Schulman with her initial report providing numerous avenues for further investigation:

> The following are things that weren't done previously:
>
> - There is very little information about Richard's life in California and Oregon. I can't find any interviews with family members or school records from ages 7-14. I can't find any information on Richard's stay with his brother in Oregon which coincides with his visits to Adventist Medical Center and the still unexplained arrival at a church in a state of confusion while on his way to Oregon Health & Science University. This happened immediately before he moved to Killeen. My recommendation would be personal interviews with the family members particularly the brother in Oregon. (I think there's adequate documentation in the Mitigation Literature that telephone interviews are inadequate. I can provide references if that helps).
>
> - There is very little history in an organized manner on Richard's substance abuse problems and particularly in relatio[n] to family, inter-generational patterns. This was not discussed in the trial at all.
>
> - The head-injury issue seems ambiguous to me. Dr. Proler reported on an EEG reading but it didn't go anywhere after that. . . . A neuropsychiatric

> evaluation on MTBI (Mild Traumatic Brain Injury) might provide a better assessment.
>
> - Dr. Susan Stone's testimony was diagnosis driven and not easy to follow and with a case of this complexity to expect her to cover all the areas of Richard's life is unrealistic. She often did not have documentation to back up her statements and I think the job was just too big. She did have some help from Dr. Jacobvitz who di[s]cussed attachment issues but the three expert' presentations were never tied together….

A268. Larsen met with Mr. Tabler a month later but conducted no further investigation. To that point, Ms. Larsen had spent approximately thirty hours attending to preliminary matters—visiting with Mr. Tabler once, reviewing the trial record, and speaking with state habeas counsel. A270.

88. What remained to be done were the actual tasks of investigation. As Schulman's May 1, 2008 request for more funds makes clear, Larsen had yet to actually perform any investigation beyond her single meeting with Mr. Tabler. A272. Tasks included "compil[ing] a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation, interviews, and collection of documents" and "provid[ing] social history information to experts to enable them to conduct competent and reliable evaluations." A272. Yet the court never approved counsel's additional request, and Ms. Larsen ceased work on Petitioner's case.

3. Flip-flopping on waiver: March 2008 – May 2008

89. Meanwhile, beginning in March 2008, Mr. Tabler began to yo-yo back and forth on whether he wanted to pursue post-conviction legal proceedings. On March 20, Tabler responded positively to the first contact with his counsel in two months. He wrote, "Dear David, ¶ Damn! Long time no hear from you old timer! . . . [I]n your opinion, how's it look after seeing my record, honestly?" A278. On March 31, though, Mr. Tabler's feelings changed suddenly. He wrote Schulman:

> Dear Mr. Schulman,
>
> I feel obligated to inform you of some actions I took by way of letter to the Courts. Please understand that it's my life and my decision what happens. Please notify "Beth Larson" that her services are no-longer needed. I've decided life in prison is not a life, therefore I've written a letter to the Courts asking that all my appeals after my direct appeal on May 6th, 2008 be dropped and or withdrawn as soon as possible. . . . As my Attorney I ask that you also file to withdrawl [sic] my appeals after my direct appeal. These are my true feelings, please accept my decision.

A280. On April 7, 2008, the Bell County District Clerk filed Mr. Tabler's letter:

> May this letter of withdrawl [sic] find the 264th District Courts safely. . . . To my understanding my direct appeal is due in May 6th, 2008. Should that appeal be denied, I'm asking that no other appeals be turned in on my behalf. If any appeals are turned in, I request that they be dropped as soon as possible please. . . . I'm ready and willing to accept my fate. Now I ask that the Courts accept and grant my letter of withdrawal of all my appeals after my direct appeal.

A281. Before the trial court could even file his last letter, Mr. Tabler whipsawed back to his original position. On April 5, 2008, he wrote Schulman again:

> Listen… The time in here is very hard on the mind, and when staff here starts fucking with ones mail, it makes it harder. That's why I keep on changing my mind about my appeals. Do you understand? Anyways I don't want to drop my appeals, I just want off Death Row a.s.a.p.

A284. Mr. Tabler explained that receiving a copy of his trial record and an unexpected visit from a friend "change[d] my mind this time." This led to a realization: "this place has changed me to be emotionless and harden my heart! Also some inmates. . . said . . . that they don't know when I'm going to explode and do harm to someone, I've been eating less and isolating myself from all and it's making me sick." "So," Mr. Tabler declared, "I vowed to fight Texas & Death Row, by winning my appeals, and you're going to help me!" And Tabler asked for Schulman's patience: "Please bare [sic] with me, okay?" A284.

90. By the time Larsen visited with Mr. Tabler on April 11, there was no mention of waiving. In response to the flurry of letters, Schulman observed that his client "appears to run quite hot and cold – he must have a very depressed side." A286.

4. "Stalled": May 2008 – August 2008

91. On May 2, 2008, Schulman received a disturbing letter from Mr. Tabler:

> This is a emergency!! Please contact Gloria by phone & e-mail and tell her to contact my mom and the F.B.I., a.s.a.p.!!! I'm in serious FEAR For My Life! I've been verb[ally] threatened by the folling - - - Warden Simmons, Warden Hirch, Major Smith, and Captain Lacox today! They said they were going to kill me in my cell! Please help me!

A287. This got Schulman's attention. He immediately contacted Dr. Susan Stone and Phil Wischkaemper, another capital defense attorney, seeking advice:

> [Tabler] has twice volunteered and twice changed his mind. I just received a very bizarre letter from him, claiming that four supervisors have threatened to kill him in his cell.
>
> I think I need to have him examined right away, but want to get a shrink/ counselor who can act as part of the defense team. I'm probably looking for someone in Houston or at least accessible to Livingston. Any suggestions?

A288. Schulman spoke with Beth Larsen regarding Mr. Tabler's mental health and "[b]oth of use [sic] agree he is in some sort of distress but are uncertain whether this is a long standing problem or a result of confinement on death row (him becoming more paranoid)." A289. On Mr. Wischkaemper's recommendation, Schulman reached out to Dr. Kit Harrison, a forensic psychologist from Houston. A290. On May 9, Schulman filed an *ex parte* Request for Additional Investigative Funds to have Tabler "examined by a forensic psychologist for purposes of conducting a neuropsychological evaluation." A788. Schulman informed his client of these new developments. A291.

92. On May 15, 2008, Mr. Tabler wrote Schulman and informed him his condition was worsening. Tabler requested that Schulman no longer give information to Tabler's

girlfriend on the outside, Gloria Cortez. Tabler indicated that he had "no problem with" Dr. Kit Harrison examining him or Beth Larsen investigating, "but I'm seriously not to[o] sure that I wanna go forward with my appeals after my direct appeal." Tabler continued to express his doubt, "After my direct appeal, I may decide to drop my appeals and be a volunteer for execution. . . . You should know that Judge Trudo is not going to grant you anything. I'd rather you ask her to please drop my direct appeal. This is what I really want!" A292. Schulman replied on May 24. Schulman said he was "sorry to hear that you feel depressed in the manner you do, and that you are considering dropping all efforts to get relief after your direct appeal is over" but insisted that "I must press on trying to find whatever is to be found." A293. On June 2, Mr. Tabler responded to Schulman. Misunderstanding what Schulman had meant by "relief," Tabler asked Schulman whether "you honestly believe that I'll ever feel relief." A294. Tabler explained why he felt this way:

> Before I came to the 'Row' I had a little life left in me. Now I have none, Hell last week I attacked a SGT. and am now on 2 weeks of strict confinement! I'm not like this and I refuse to submit to the many harmful thoughts I've been having t[…] others! Every Tuesday a Mr. Johnson from Mental Health comes to speak with me because I've been showing signs of killing myself or trying to kill an officer that way in turn they kill me. I have a serious death wish Mr. Schulman, and I do wish to drop all my appeals after my direct appeal, and it's much deeper then [sic] you could imagine.

A294. Tabler closed with the request that Schulman send a letter to the court notifying it of his wishes. *Id.*

93. On Friday, June 6, 2008—likely before receiving Tabler's June 2 letter—Schulman had an *ex parte* telephone conversation with Judge Trudo. As he explained in an email to Beth Larsen, during that conversation, Judge Trudo indicated "[s]he is already very reluctant to spend more money, but did express a willingness to do so." A296. According to Schulman, "We had a conversation about our client's stated intent to end all appeals. I told her

that this was one of the reasons I needed to have him examined by Dr. Harrison."A296. This disclosure led the court to come to an unrecorded, *ex parte* decision to "sit on" Schulman's investigative funding request pending an ordered competency examination:

> The bottom line is that she is going to sit on the request for more funds for you until we get the results of Dr. Harrison's exam and learn whether (a) Dr. Harrison thinks our client is competent, and (b) our client really intends to waive off on the habeas case . . . which he can do if he's competent. So, at this point, there is no money approved for continuing the mitigation investigation. If there is a determination that Blue is not competent to make this decision, or if he decides to continue the habeas case, she will approve more money.

A296. The Bell County Clerk's file also reflects this conversation. Schulman's May 1, 2008 mitigation funds request bears an annotation:

> 6/9/08
> Hold in file
> under seal
> until further
> word from
> atty per conversation
> w/ him last week

A298. On June 9, Judge Trudo authorized $2000 for Dr. Harrison to "conduct[] a neuropsychological evaluation appropriate in assisting counsel for the Defendant in the preparation of the defense." A299. But, as Schulman expressed to Dr. Harrison, Judge Trudo would in fact expect more than that; she also "expect[s] you to provide me with your opinion as to whether Mr. Tabler was legally competent." A302. (Schulman also explained these dual purposes to Mr. Tabler in a June 14 letter. A303.)

94. Pursuant to this tacit understanding, Schulman arranged for Dr. Kit Harrison to examine his client. On June 27, Dr. Harrison visited Mr. Tabler at the Polunsky Unit. Mr. Tabler wrote Schulman after the visit on July 2. Tabler informed Schulman that the visit went well, Dr. Harrison was likely to find him competent, and he still wanted to "drop my appeals after my direct appeal." "The people of Texas wanna execute me, so let's get this . . . moving,"

Tabler concluded. A304. In response, Schulman reiterated that "[n]othing, literally nothing, will happen in your case until the Court of Criminal Appeals issues its opinion on your direct appeal and so "it is definitely in your best interest to put this decision off until the first day it can have any real effect." Schulman framed the decision facing his client: "If you agree with me, you need to do nothing. We will continue on your case. If you disagree, then you will have to advise the Courts that you wish to waive your right to your habeas corpus proceeding. I simply do not think it is my job to do so, and I do not wish to do so." A305. On July 28, Mr. Tabler received Schulman's July 17 letter and made his decision: ""I'll tell you what, I'll try and ride these appeals out with both of you." A307.[10]

95. Also on July 28, 2008, Schulman received a two-page letter from Dr. Harrison. A309. Dr. Harrison recounted the battery of neuropsychological tests he conducted during his four-hour examination and then framed the issue he believed he was referred to answer: "whether the defendant is competent to make decisions concerning suspending his rights to automatic appeal of his capital murder conviction and resulting execution." A309-10. Dr. Harrison found that Tabler was "forensically competent to make decisions to suspend his automatic appeal." A310. He based this finding on the fact that Tabler "demonstrated very adequate information concerning his conviction, trial process, role of counsel in his defense, ability to participate in his defense, sentencing requirements, and rights to an automatic appeal to a higher court concerning his case in chief." Dr. Harrison also

[10] Mr. Tabler also requested an attorney-client phone call to talk about his case and complained of the disparate treatment he was receiving regarding phone calls to family:

I've been here on Death Row since April 5th, 2007 and have only been allowed (1) one phone call to my Mom and none to my Sister! And I continue to request to make a 90-day phone call to both, only to be denied. Would you please call down here and request an attorney, client phone call? That way I can talk to you & find out everything that's going on & just maybe you'll let me get a phone call 3 way or conference call to my Mom and Sister please?

acknowledged that Tabler's "knowledge understandably weakens when it comes to all the legal possibilities which could result in a possible suspension of the death sentence." A310. Dr. Harrison commented that "[i]t is not at all unusual to have death row inmates vacillate on such matters affecting their ultimate best interests, particularly in proportion to their perceived circumstances and fluctuating mental status while incarcerated." At the time of Dr. Harrison's interview on June 27, Tabler "expressed a desire to continue the appeal process."

96. On August 1, 2008, Schulman discussed the news of his client's latest decision to "ride out" the legal process with the court, his defense team and his client. First, he wrote Judge Trudo. "Following our last conversation," Schulman confided, "I wrote Mr. Tabler and told him that, while he had the right to terminate the *habeas corpus* process, I recommended that he did not do anything until after the Court of Criminal Appeals had acted on his direct appeal. He has written and agreed to do that. Thus, I will proceed with the habeas investigation to completion." A311. Schulman renewed his request for mitigation funding. Second, Schulman wrote his client. He approved of what he called his client's "wait and see" approach. He assured Mr. Tabler that "I am marshaling our resources to finish the mitigation investigation and expect to visit with all of your lawyers in the next few weeks." A312. Third, he wrote his defense team—Beth Larsen as well as investigator Rick Ojeda—to tell them the investigation was "still a 'go.'" He reported that Dr. Harrison has found their client "competent to make the decision to drop his habeas corpus proceeding." "Nevertheless," he stated, "Blue has written and indicated he will 'try' to hang in for the entire appellate/habeas process." A313.

97. A month passed with no further investigation.[11] Schulman told Larsen that the case was "stalled" awaiting further funding for mitigation investigation from the court. A318. In the month since Schulman declared that the case was "still a 'go,'" he himself did less than an hour of work on the case. A199. From April 1 to September 1, he had done twenty-one hours of work on Mr. Tabler's death penalty case, or about one hour per week. None of that time involved obtaining records, conducting interviews, or researching and developing claims. A198-99.

5. The Hearing: September 30, 2008

98. On September 23, 2008 Schulman received a copy of his client's August 11 letter to the Court of Criminal Appeals:

> I've spoken with my appeal attorneys and they've advised me that they don't beleive it's their job to notify the Courts that I'd like to waive my rights to habeas corpus proceeding and volunteer for execution. So that is the reasoning for this letter. I've already written my Trial Judge & said I wish to drop all my appeals & get an execution date.[12] Would you also notify the 264th District Courts of Bell County Texas, Judge Martha J. Trudo, that I've written the Courts Criminal Appeals letting you know that I'm requesting an execution date & wish to waive my rights to a habeas corpus proceeding. Thank you & Peace be with you!

A791. On receipt of this letter, Schulman wrote to his team as well as Karyl Krug to predict that Judge Trudo would hold a hearing on the letter "because her alternative is to ignore it and approve more expenditures." A320. On September 22, 2008, Schulman learned his prediction had come true: "Judge Trudo called and informed me that she has scheduled a hearing in the Tabler case for next Tuesday, September 3rd, at 9:00 a.m. . . . At that time she will decide

---

[11] On September 1, 2008, Schulman e-mailed Dr. Harrison a single pre-trial motion that he thought might be useful in the preparation of his report. On September 2, 2008, Schulman informed trial counsel John Donahue "I am still planning on visiting you and inspecting your file in the Tabler case." Schulman's billing ledger indicates he never did travel to inspect Donahue's files. A196, 316, 317.

[12] Neither Bell County clerk records nor Mr. Schulman's files reflect receipt of Mr. Tabler's letter to the trial court indicating that Mr. Tabler wished to drop all his appeals.

whether to allow him to drop his habeas claims or to deny him the ability to do so and approve our pending requests for funding." A321.

99. Before learning of the hearing, though, Schulman had at last received Dr. Kit Harrison's neuro-psychological evaluation. The report ran over eighteen single-spaced pages and contained specific diagnoses and an extended mental status examination. "Although being oriented in all spheres," Dr. Harrison remarked, Mr. Tabler "demonstrates a rapid-cycling mood destabilization with strong evidence of Bipolar Disorder, Type I":

> He demonstrates full-blown manic and euphoric ideation which is evident during interview, coupled with obvious rapid-cycling depression, suicidality, intermittent explosiveness, and surging anger with a moment's notice. Thus, he is currently thought to be a danger to himself and others. . . . Although there is a clearly manipulative and attention-seeking element to Mr. Tabler's overt statements of homicidality, he does describe compulsive desires to injure himself and others. This is thought to be, in part, due to a highly paranoid and delusional worldview of chronic duration. He gets so expansive, euphoric, and grandiose with drugs, or without drug intoxication, that he loses touch with reality. It is noted he is currently off antipsychotic medication.... He is mildly psychotic.

A491. In passing the report along to his defense team, Schulman highlighted one of the concluding passages, which reiterated that his client acted under the influence of "deep and severe constellation of mental illnesses [that] have been disabling and debilitating for him since at least early adolescence and have never been adequately managed from a medical or psychological standpoint." A322. Minutes later, his co-counsel John Jasuta replied with a question of his own, "Now this brings up an 'interesting' question: Can one who is in this type of mental state/condition truly waive anything of right, especially of this level of importance given the specificity evidenced in the excerpt of the report you sent?" A324. That question remained unanswered in Schulman's records.

100. In a September 22 letter, Schulman notified Mr. Tabler of his hearing. "Just as I told you that I didn't think it is my job to help you do this, I am also of the opinion that it is not

my job to argue against it." Schulman added, "I guess this will just be between you and Judge Trudo. If she asks whether I think you're competent to make this decision, I will tell her that you are, but that will be the extent of my involvement." Schulman indicated he would not see his client until the day of the hearing. A327. Schulman did not know—or in any case never remarked upon—his client's recent self-harming and erratic behavior in custody. On September 15, Mr. Tabler cut his left inner elbow joint with a razor blade, "transecting his antecubital fossa" and requiring sutures. A792

101. On September 30, 2008, the trial court conducted a "special hearing" on Mr. Tabler's competency. The hearing lasted no longer than 15 minutes. V.CR.357-369. Excluding the cover page, appearances page, and court reporter certification, the hearing transcript takes up 12.5 pages of the record. As promised, attorneys Schulman and Jasuta purposefully abdicated any role. Schulman announced that, while present for the proceeding, "we do not announce ready[] because we do not intend to take a position one way or the other of what should happen today." *Id.* at 357.

102. The record consists of a series of twenty questions the trial court posed to Mr. Tabler, only one of which called for something other than a "yes" or "no" answer, and brief discussions with the attorneys regarding exhibits to the hearing and anticipated proceedings in the event the CCA affirmed the convictions and death sentence on direct appeal. *Id.* at 359-65. The court ascertained through these questions:

- That Mr. Tabler was aware that his direct appeal was not completed, that he had a right to pursue habeas corpus in the state court "if [his] direct appeal is affirmed," that he did not wish to go forward with his state habeas in the event he lost the appeal, and that the state would be authorized to and likely would thereafter seek an execution date.

- That Mr. Tabler did not want to go forward with his "state habeas appeal," had consulted with his attorneys about his decision, and had not been coerced by anyone to make it.
- That Mr. Tabler agreed with the court that he did not want to continue his appeals and that the court's statement to that effect was accurate.
- That he understood that, if he changed his mind "after the time period has run to file the writ," the CCA might not entertain his application.
- That he had consulted with his lawyers about the time periods for the writ and appeals and understood them, and understood that the CCA might not be willing to give him additional time if he changed his mind.

Id. at 359-265.

103. Asked to tell the court what he meant in his August 22, 2008 letter to the CCA, Mr. Tabler stated: "Basically, I'm asking the Courts of Appeals to drop all of my appeals after my direct appeal. And should my direct appeal be denied, I'm asking for an execution date as soon as possible." *Id.* at 362. At the conclusion of questioning, the court addressed the issue of competency:

> **The Court:** All right. I think I have also – do you have any concerns at this time, Mr. Tabler, regarding your competency and whether or not you are mentally competent to make this decision?
>
> **Mr. Tabler:** No. I'm competent enough.

Id. at 365.

The court entered as a "Court Exhibit" a letter submitted by Schulman and Jasuta "that indicates, without going into a lot of detail, that you have been examined by Dr. [Kit] Harrison who has found you to be competent." *Id.* at 366.[13] Assistant District Attorney Sean Proctor stated that, "as

[13] The court is referring to the two-page competency letter, though the document was never entered into the Clerk's Record.

[the court is] aware, the usual practice is to have the . . . State submit a motion for the defendant's examination for competency at this time and the Court to order that. But since that has already been taken care of, the State doesn't have anything further at this time." *Id.* at 367.

104. The court concluded the proceeding, stating, "Then we will be waiting the appeal time, I guess, for the results of the direct appeal. And then subsequent to that then we'll probably have another hearing date at that time to set an execution date." *Id.* But the court instructed attorneys Schulman and Jasuta that they would remain as "standby counsel." *Id.* at 368.

6. The Cell Phone Incident and Its Fallout: October 2008 – June 2009

105. Following the hearing, Schulman drafted and circulated a proposed order to the court "granting request to dispense with habeas proceeding and releasing court-appointed habeas counsel." He composed the order from his recollection. To Bell County Assistant District Attorney Sean Proctor, Schulman candidly explained his role as "standby counsel" to be "a pro bono gig," in which he and Jasuta would only act "should [Mr. Tabler] (a) ask any questions, or (b) change his mind vis-à-vis his habeas corpus action." A330. The court signed Schulman's proposed order on November 5, 2008, and Schulman soon thereafter sought to claim his fees. V.CR.371-72.

106. A week after returning to Polunsky from Belton, Mr. Tabler began calling Texas State Senator John Whitmire using a contraband cell phone from inside the prison. According to Senator Whitmire, Mr. Tabler said to him, "I want you to help me appeal my case. The system thinks I've given up my appeals but if you could help me find a pro bono attorney I would appeal it." Hearing Before the S. Comm. on Crim. Just., 80th Legislature, Interim Sess. (Tex. Oct. 21, 2008) (statement of Sen. John Whitmire, Chair), http://tlcsenate.granicus.com/MediaPlayer.php?clip_id=1203 (video at 6:04-6:20). Mr. Tabler

described some of the issues he believed should be addressed in his state habeas application. Mr. Tabler also requested help seeing his mother and grandmother, and "offer[ed] information on abuse issues on death row." Jennifer Latson, *Death row calling, 2,800 times*, Hous. Chron., Oct. 21, 2008, at A1; Mike Ward, *Smuggled cell phone allowed hundreds of death row calls*, Austin Am.-Statesman, Oct. 21, 2008, at A1. Sen. Whitmire reported that Mr. Tabler knew information about his family members. Hearing Before the S. Comm. on Crim. Just. (statement of Sen. John Whitmire, Chair) (video at 5:18-5:38).

107. The calls to Sen. Whitmire caused enormous fallout. At the insistence of the powerful state senator, who served as Chair of the Senate Criminal Justice Committee, the TDCJ Office of Inspector General immediately launched an investigation into the illegal cell phone calls. On October 20, 2008, Richard Tabler was arrested in his cell in possession of a contraband cell phone. Texas law enforcement officials also arrested Richard's mother Lorraine Tabler and sister Kristina Martinez for purchasing minutes for the phone. The same day, Governor Rick Perry ordered a lockdown of the entire Texas prison system to search for cell phones and other illegal contraband. Press Release, Gov. Perry Directs Texas Board of Criminal Justice to Take Immediate Action on Prison Security (Oct. 20, 2008), http://web.archive.org/web/20081025133900/http://governor.state.tx.us/news/press-release/11447/.

108. Soon after his arrest, Mr. Tabler was sent to a psychiatric facility, Jester IV. He remained there from October 22 to November 4, where he was monitored under suicide watch. *See* Housing/Job Assignment History, Resp. Hr'g Ex. B at 13 (indicating that Tabler was housed at "J4"—i.e., Jester IV—from October 22 to November 4 for mental health ("MH") reasons). When he returned from the psychiatric facility, Mr. Tabler was placed in a new wing

of the Polunsky Unit, A Pod, commonly known as Death Watch. There, Mr. Tabler has since endured extended and severe isolation. In a memoir, former death row chaplain Rick Anderson describes the conditions in which Richard Tabler has been kept since.

> Due to the political nature of Gabriel's[14] offense, he was placed in hyper-isolation from all other offenders and from anyone except security. During the same period of time, he was denied visitation with loved ones and the opportunity to spend an hour a day in recreation as the other death row inmates were allowed. I had seen other offenders be disciplined for a period of time, not to exceed a couple of months or so. Even the offenders who had actually assaulted officers didn't seem to be treated as severely for such an extended period of time. Gabriel's isolated custody stretched on for many months without respite.

Rick Anderson, *God's Feet Are in My Sandbox: Faith Chronicles of a Texas Death Row Chaplain* 176 (2011).

109. In 2011, Meredith Rountree, an attorney who later volunteered to help Mr. Tabler, reported to this Court on Mr. Tabler's horrific conditions of confinement following the crackdown. A332; *see also* Pet'r's Sealed Ex Parte Mot. Authorization of Funds for Expert Assistance at 4-10, March 1, 2011, ECF No. 20 (incorporating Rountree's description of Tabler's conditions wholecloth). Rountree recounted that she had "received reports from a variety of sources":

> that at various times, the lights in Mr. Tabler's cell have been on 24 hours a day for over 100 days; officers have banged on his cell door at all hours; that he has multiple cameras in and around his cell; and that he has been intensely isolated within even the highly isolating confines of Texas' death row.

Doc. No. 20 at 6. Rountree related Mr. Tabler's reports of "having been assaulted by staff, and having his property destroyed or stolen." Rountree also documented extensive TDCJ interference with Mr. Tabler's communications with his counsel as well as other correspondents.

[14] In Anderson's memoir, he changed the names of real persons "in order to protect the innocent." Richard Tabler became "Gabriel Slaughter."

110. Between November 2008 and June 2009, Mr. Tabler wrote the courts requesting an execution date no fewer than twelve (12) times. A949-89. A typical example is his letter on December 29, 2008, to Judge Trudo:

> I'm writing this letter in hopes that you will respond with an answer and some news about what's going on. Since September 30, 2008, when I waived all my rights to appeals, I've had no contact with any attorneys. Nor have I changed my mind. Once again I'm asking you in good faith to grant my request for execution a.s.a.p. Will you please give me an execution date for the new year? You have my word that I'll continue to pester you with, a letter once a week, until you give me what I'm asking.

A950.

111. Other letters to Judge Trudo illustrate his unsettled attitude toward waiving his appeals and his struggles with mental illness. On February 19, 2009, Mr. Tabler wrote that corrections officers at the Polunsky Unit threatened his life. A934. "Instead of worrying about being 'beat to death' by the officers I tried to kill myself by cutting both my arms and cutting through each artery." *Id.* He reported that he was transferred to Jester IV on January 20 and would remain there at least until March 11, 2009. *Id.* Mr. Tabler felt certain that "I'll be killed by the officers or I'll end up killing myself" upon returning to the Polunsky Unit. *Id.* Judge Trudo apparently credited Mr. Tabler's allegations of threats, because on February 26, 2009, she wrote a letter to TDCJ Inspector General John Moriarty and Wardens Tim Simmons and Tommie Haynes of the Polunsky and Jester IV facilities requesting that they "investigate Mr. Tabler's claims and ensure his safety pending appeal and further orders of the court." A365

112. On March 2, 2009, Tabler wrote Judge Trudo while again committed to the custody of the Jester IV psychiatric facility. He began simply, "I'm not to[o] sure what I'd like to do anymore":

> Some times I'm in good spirits, then for no reason I'll have flashbacks and want to cry, scream, and kill others along with myself. . . . Some days I see myself picking up my appeals thanks to an honest persons who's been getting in my

> head, but when he's not around to help me remember what I should fight for, I become more of an animal that wants nothing more then to see the fear in another's eyes before the kill!

In conclusion, Mr. Tabler begged Judge Trudo to block these doubts and urges by executing him.

113. Some of Mr. Tabler's correspondence with the trial court is irretrievably lost. In a letter dated April 8, 2009, Mr. Tabler alludes to a March 30, 2009 letter *from* Judge Trudo "explaining that the courts cannot move forward until a mandate is received." A366. That letter is neither in the Bell County clerk's file nor the CCA's. This is not the only instance of important but missing correspondence.[15]

7. Picking Up Appeals: June 2009 – September 2009

114. On June 9, 2009, Mr. Tabler wrote the trial court requesting to "pick up" his habeas corpus proceedings. A367. The letter was forwarded to the CCA and Schulman.

115. On July 5, Schulman and Jasuta went over the issue with Robin Norris, an attorney they believed might help. In preparing, Schulman mentioned that a particular case, *Ex parte Reynoso*, 228 S.W.3d 163 (Tex. Crim. App. 2007), "might spell doom" for their attempt to reinstate their client's habeas application. A425. Schulman told Mr. Tabler that a way to get the case reinstated was to argue that the trial court's failed to notify the CCA that no writ had been filed. A368. At Schulman's prompting, on July 7, the Clerk of the Court of Criminal Appeals sent a letter to the trial court, informing it that it had received a copy of Mr. Tabler's letter and stating that the CCA had not received the convicting court's notice pursuant to Tex. Code Crim. Proc. 11.071 § 4(d). A935. In response, the trial court filed a letter with the CCA regarding the waiver. It stated,

> On September 30, 2008, after repeated requests by the Applicant to waive his right to post-conviction Writ process, and to have an execution date set, the trial court held a hearing on the status of the Applicant's Writ. Present at the hearing

[15] *See, e.g.*, note 16 *infra*.

> were: the Applicant, the Applicant's counsel, and the attorney for the State. The trial court found that the Applicant was competent to make the decision to waive the habeas process, understood the ramifications of his waiver, but still persisted in his desire to dispense with the habeas process. In an Order signed November 5, 2008, the trial court granted the Applicant's request to dispense with the habeas process, and released his appointed attorneys from their responsibilities regarding his application.

116. Before the trial court's letter was filed, on July 14, Schulman and Jasuta filed a "Motion to Permit Counsel to Continue or Resume Representation of the Applicant and to Establish a New Filing Date for the Application." A939. The motion argued that "despite his competency and his stated understanding of the fact that his decision to dispense with his habeas corpus action, Applicant should not have been permitted to make that decision." *Id.* As a result of his "on again – off again" desires to waive, Schulman and Jasuta argued, Mr. Tabler should be entitled to file an untimely application as set out in Tex. Code Crim. Proc. art. 11.071 § 4A(2). *Id.*

117. On September 16, 2009, the Court of Criminal Appeals denied Mr. Tabler's motion. *Ex parte Tabler*, No. WR-72,350-01 (Tex. Crim. App. Sep. 16, 2009). Citing to *Ex parte Reynoso*, 228 S.W.3d 163, 166 (Tex. Crim. App. 2007), *vacated on reh'g*, 257 S.W.3d 715 (2008), the CCA concluded that Mr. Tabler had not shown good cause because "the failure to file [his] application for writ of habeas corpus is attributable to Applicant's own continued insistence on foregoing any such remedy."

D. Federal Habeas

1. Appointment and Stay: September 2009 – February 2010

118. Following the CCA's denial of Schulman's motion to file an untimely application, Schulman was at a loss and sought the help of Meredith Rountree, an Austin lawyer who offered to voluntarily provide "technical assistance . . . in incorporating evidence

about conditions of confinement into litigation about the competence of [Mr. Tabler's] waiver." A369.

119. On December 16, 2009, the CCA denied Mr. Tabler's direct appeal. On January 27, 2010, the Bell County District Attorney sought an execution date, and the same day Judge Trudo signed the order. Schulman and Jasuta moved for appointment and a stay in federal court on February 9, 2010, which this Court granted on February 25, ECF No. 6.

2. Waiver Redux: March 2010 – August 2011

120. With Schulman and Jasuta appointed in federal court, Mr. Tabler recognized that his lawyers could again work on investigating his case. In a March 9 letter, he expressed gratitude to his lawyers "for sticking with me." A371. He requested legal materials be sent to him and instructed his attorneys to look into his co-defendant Timothy Doan Payne's trial and appeal. Schulman responded a week later, refusing to send legal materials and stating he would be "unable" to get a copy of Payne's trial record. A373.

121. In the ensuing months, Mr. Tabler's enthusiasm for his federal habeas evaporated as a result of continuing communication problems with his attorneys, exceptionally harsh conditions of confinement, and mental health deterioration. By April 1, Mr. Tabler, in his own words, was "not doing well" because of "serious problems within the system, since being given a stay of execution." A374. Tabler felt that his lawyers did not "give a damn about the shit I'm receiving inside these walls!!" *Id.* Tabler gave his lawyers an ultimatum: "Help me smooth shit out here and get my visits back with my mom, sister and grandma, or get me another execution date a.s.a.p.!" *Id.*

122. For over two months, Tabler's letter went unanswered. Again, Schulman was absent, apparently in part because he was "out of [the] country." In a May 10 e-mail, Jasuta

recorded the following message after a phone call with Assistant Attorney General Fredericka Sargent:

> Call from Fredericka Sargent (ass't AG) who informed me that she, the DA and TCt had gotten letters[16] from Richard Tabler saying he didn't want any more litigation. I said he's having mood swings. He hasn't told us that. We've haven't received any such letter.
>
> I asked for a little time as you were out of country and next week to look into it is fine.

A375.

123. On May 24, 2010, Tabler contacted this Court to ask for an execution date. *See* Letter from Richard Tabler to "Chief Justice" W.S. Smith, Jr. (May 24, 2010), filed as Mot. for Reconsideration re Order on Mot. to Appear Pro Hac Vice, Order on Motion to Appoint Counsel, June 2, 2010 , ECF No. 8. Schulman and Jasuta still did not respond. Then, on June 7, Schulman received an e-mail from Meredith Rountree expressing concern about Mr. Tabler's mental state. Rountree reported that "my last conversation (last week) with Tabler was the first time I had the most serious questions about whether he was psychotic." A379. She described how she doubted "whether he was in touch with reality": "He essentially was saying that he'd got a letter from the DOD saying that he had been in some kind of Special Forces outfit, but he couldn't recall that experience, but that he'd been having intrusive dreams/flashbacks, things like that." *Id.* Rountree also said that she had talked with Lorraine Tabler who told Rountree "that she knows from experience that he believes things that are not connected to reality." *Id.* Mr. Tabler's mother also explained that "he has previously been diagnosed with Bipolar disorder, and [has] been put on medication in the past." *Id.*

[16] The Bell County clerk's file does not reflect any letter received during this period. It is unclear how attorney Sargent learned of these letters or whether her office possesses copies of them.

124. Schulman reacted with indifference to these reports. Schulman wrote Tabler huffily, "I apologize for my recalcitrance, but would let you know that I have been very busy outside the office for the last three months, and have been barely able to keep up with the cases with approaching due dates. . . . Nothing has changed since [the March 16 letter]." A380. Schulman concluded flatly, "Right now . . . I don't know anything that I can do [for you]." *Id.*

125. A week later, though, Schulman took a new position on his client's attempts to waive. Mr. Tabler had simultaneously sought to withdraw his already-filed petition for writ of certiorari in the Supreme Court. In a "Unified Statement of Counsel," Schulman outlined his client's mental illnesses and their effect on his client's capacity to waive:

> Petitioner suffers from serious mental disabilities, including bipolar disorder, and at this time is not competent and able to make a knowing, voluntary and intelligent waiver of his rights to appeal[.] Petitioner demonstrates a deep and severe constellation of mental illnesses . . . . These have been disabling and debilitating for him since early adolescence, and have never been adequately managed from a medical or psychological standpoint.

Unified Statement of Counsel for Pet'r at 2-3, June 15, 2010, ECF No. 10.

These descriptions of mental illness, lifted verbatim from Dr. Harrison's September 2008 report, *see* A503, were presented for the first time as evidence Mr. Tabler was incapable of waiving his appellate and post-conviction rights.

126. On November 16, 2010, Schulman and Jasuta moved to reinstate proceedings and at the same time moved for this Court to hold a competency hearing. They asserted that their client continues to seek to waive. They further explained that they believed Mr. Tabler was not "competent to make this decision" and that he was making this decision involuntarily. On January 18, 2011, this Court granted the request. Order, January 18, 2011, ECF No. 12. The order stated that Dr. Richard Saunders, a licensed psychologist, would perform a psychological evaluation of Mr. Tabler "regarding his mental competency and related mental

health issues pursuant to 18 U.S.C. § 3599(f), g(2)" and according to the standards set out in 18 U.S.C. §§ 4241 and 4247. *Id.* at 1. The order further instructed both parties to "provide Dr. Saunders with any medical records, results of any previous psychiatric or psychological evaluations that were performed on Petitioner or any other pertinent information that they might have." *Id.* at 2.

127. When Dr. Saunders reached out to Schulman for records, Schulman informed him that, in his nearly four years on the case, he had collected precisely one relevant record: Dr. Kit Harrison's September 2008 report. A395. But in a February 11 letter, Schulman reneged on his promise to provide Harrison's report, apparently claiming he could not send the confidential report to a non-defense expert.

128. Schulman and Jasuta did, however, attempt to obtain expert assistance under 18 U.S.C. § 3599(f) to develop and present evidence regarding the voluntariness of Mr. Tabler's waiver of his appeals. Based on a motion drafted by Meredith Rountree, Schulman and Jasuta stated that they had reasonable cause to doubt the voluntariness of their client's choice. Pet'r's Sealed Ex Parte Mot. Authorization of Funds for Expert Assistance, March 1, 2011, ECF No. 20. They proposed to hire a conditions of confinement expert to investigate Mr. Tabler's claims of harsh treatment, retaliation and deprivation, and to explain whether they affected his capacity to waive. *Id.* at 10-13. This Court denied the motion in a sealed order. Order, March 1, 2011, Doc. No. 18.

129. On June 20, Dr. Saunders provided his report to Schulman. A504-15 The report relied on no documents provided by Mr. Tabler's counsel. A515. The report recommended that Mr. Tabler be found competent to waive further proceedings. A504-514. However, Dr. Saunders also concluded that Mr. Tabler's desire to waive was primarily due to

his conditions and the perceived treatment Mr. Tabler reported receiving from prison staff and other inmates. *Id.* During Dr. Saunders's interview, Mr. Tabler reported several incidents in which he was assaulted by guards. In one incident, the guards handcuffed him, removed him from his cell, and pulled on his arm, dislocating his shoulder. A507. Another time, Mr. Tabler was "pistol whipped." *Id.* Mr. Tabler reported another incident in which he was assaulted by three guards "and one attempted 'sexual sodomy.'" *Id.*

130. Mr. Tabler claimed that several members of the prison staff had threatened that if he does not volunteer for execution, "something bad would happen to his mother, sister or niece." Mr. Tabler also claimed that two TDCJ guards "put out a '2.5 million dollar contract' to have him killed." *Id.*

131. After receiving Dr. Saunders's report, this Court scheduled a hearing for August 17 regarding whether Mr. Tabler's was competent to waive and whether his decision constituted a voluntary, intelligent and knowing waiver of his rights. Doc. No. 23. This Court made clear that in addition to Dr. Saunders's report, the parties could present whatever information they had relevant to these issues. *Id.* at 2.

132. At the hearing, this Court questioned Mr. Tabler regarding his desire to waive. Mr. Tabler complained that his treatment and conditions of confinement, particularly the prohibition of visits from his family and strife with prison staff, were, at least in part, driving his decision to waive. R. 161-163. This Court questioned Mr. Tabler regarding his education level, mental health history, and the finality of such a decision to waive federal habeas proceedings. R. 164-166. Mr. Tabler refused to answer this Court's questions regarding the portion of Dr. Saunders's report addressing reports of threats to Mr. Tabler's family by prison

staff if he did not volunteer for execution. R. 168 ("I can't answer you, Judge, plain and simple, and I won't.").

133. At the hearing, Mr. Schulman wavered greatly over whether to provide to this Court Dr. Harrison's complete 18-page report. R. 172-74. The report, which Mr. Schulman acknowledged detailed Mr. Tabler's mental health over the course of his life and could be helpful in determining Mr. Tabler's competency and mental state, had never been "made public" before and was not provided to Dr. Saunders. R. 172. Although this Court informed Mr. Schulman that it would like to have the report, ultimately, Mr. Schulman chose to not offer it. R. 175.

134. The next day, this Court entered an order finding Mr. Tabler competent to waive, but finding his waiver involuntary. Sealed Order, August 18, 2011, Doc.No. 34. Regarding voluntariness, this Court noted the strained relationship between Mr. Tabler and both prison employees and his fellow prisoners following his arrest with a cell phone on death row. *Id.* at 4. In addition to relying on Dr. Saunders's report detailing Mr. Tabler's reports of abuse and persecution by prison staff, this Court noted that in a letter to counsel, Mr. Tabler had advised that prison guards were trying to kill him. This Court found that Mr. Tabler believed his family would be harmed by TDCJ personnel if he did not volunteer for execution. *Id.* at 5. Thus, the waiver was not voluntary. This Court ordered Mr. Tabler's case reopened to allow him to file an application for writ of habeas corpus.

3. "Whatever it is we have is what we have": August 2011 – May 2012

135. Once Mr. Tabler's case was reopened, Schulman resisted efforts to investigate and develop his client's case in federal court. From the outset, he declared repeatedly that Mr. Tabler was limited to raising issues from his direct appeal. A397. Schulman also indicated that he would take instructions from Mr. Tabler, notwithstanding this Court's order finding Mr.

Tabler's desire to waive involuntary. Thus, Schulman assured his client on August 26 that "We will not delay this case and will file whatever we're going to file before October 3rd." On August 31, Schulman proposed taking steps to exhaust some claims in state court while staying federal proceedings:

> Admittedly, these steps will add to the length of the process, and, knowing your stated intentions and apparent desires, I would not take the steps I have outlined above unless you are on board. Thus, I need for you to write and tell me specifically whether you agree I should take these steps.

A768. In successive letters responding to Schulman's notes, Mr. Tabler gave contradictory responses. First, Mr. Tabler told his attorneys to "do what you'd like." A400. Five days later in response to Schulman's specific request for direction, Mr. Tabler reiterated his position—already found to be the product of an involuntary decision—that Schulman should "***not*** file anything with anyone." A402.

136. Furthermore, Schulman viewed "staying-and-abeying" as the exclusive avenue for presenting unexhausted claims. As Schulman's motion for a stay and abeyance argued, "without the ability to return to state court and exhaust the claims properly raised in a habeas corpus application, Applicant will ultimately be denied the right to litigate those [unexhausted] claims." *See* Applicant's Motion to Stay & Abate the Proceedings at 5, ECF No. 37. When this Court denied Schulman's motion, Schulman stated to his client, "Whatever it is we have is what we have." A403.

137. The subsequent procedural history further reflects Schulman's resigned attitude. Schulman never filed a motion for expert, ancillary, or investigative assistance under 18 U.S.C. § 3599(f).[17] Schulman's amended petition failed to cite a single extra-record fact (besides its inclusion of Dr. Kit Harrison's neuropsychological evaluation in support of the claim that the

[17] Schulman requested and was denied an expert for assistance with the competency proceeding. *See* ECF No. 18 (sealed order).

Eighth Amendment bars execution of the seriously mentally ill, *see* ECF No. 39 at 20-21; Pet'r Ex. A). At the conclusion of their representation, Schulman and Jasuta submitted attorney fee vouchers pursuant to their appointment under the Criminal Justice Act. Those forms show that of the 180 total hours of work claimed by the two attorneys, not a single hour was spent on "Witness Interviews," "Consultation with Investigators or Experts," or "Obtaining & Reviewing the Court Record." ECF Nos. 60 & 61. Schulman and Jasuta spent only 4.9 hours on unspecified "Obtaining & Reviewing Documents and Evidence." *Id.*

138. When this Court invited Mr. Tabler to file a reply to the State's answer, Schulman did not. Just as Schulman had decided, "whatever it is we have is what we have" when he had to file his client's amended petition in November 2011; so, faced with filing a reply in January 2012, Schulman declared in a memo that there was "no reason to file any response," because this Court would "do what ever he intends to do irrespective of whatever we file." A404. Schulman noted that his desire to do nothing dovetailed with his client's desire to waive—"The client was okay with that advice as he really doesn't want us to file anything."

139. On February 9, 2012, this Court denied Mr. Tabler's petition. ECF No. 42. This Court applied the opt-in provision of the AEDPA and stated that "none of the waivers in § 2264 are applicable" to Mr. Tabler's procedurally defaulted claims. Schulman faced decisions about whether to seek modification of the judgment and to pursue an appeal. He was encouraged to consider these avenues by consulting attorneys Meredith Rountree and Greg Wiercioch, then of the Texas Defender Service. As Wiercioch proposed in a February 18 e-mail to Schulman, "I think an argument based on *Maples [v. Thomas,* 132 S. Ct. 912 (2012)] . . . can be raised that you were under a conflict of interest during state habeas proceedings (i.e., that you acceded to Richard's demands to abandon collateral review without adjudicating that

issue in a truly adversarial manner in state court)." A407. Wiercioch laid out the legal theory succinctly: "This conflict could be sufficient to constitute 'cause and prejudice' that could overcome the failure to present and exhaust claims in state court, allowing Judge Smith to address the merits of these claims in federal court." *Id.* Moreover, Wiercioch noted that "one could argue that Richard's circumstances changed dramatically soon after the Sept. 30, 2008, competency proceeding when Richard allegedly contacted Sen. Whitmire and the shit came down." *Id.* Yet Wiercioch cautioned Schulman that "I'm not sure you are in a position to raise a *Maples* claim, because of the conflict issue that is intertwined with it." *Id.*

140. Schulman hardened his position, however, in the face of the apparent conflict and encouragement to continue litigating. On February 27, Schulman announced that he would acquiesce in his client's desires, even though this Court had determined that those wishes were the product of an involuntary choice. A409-24. Schulman disagreed with Rountree and Wiercioch that this Court had found Mr. Tabler's desire to waive involuntary. Even if this Court had, Schulman contended, this Court's "later actions" apparently "belie[d]" that determination. A412. (Schulman did not specify what he meant.) Schulman also was guided by his feelings: "[w]hile I would feel guilty about abandoning a client, I feel worse about blocking his desires." A410. In sum, Schulman declared, "We have decided that we will respect Richard's wishes. . . and take [no] further action." A412-13.

141. Despite their position, Schulman and Jasuta agreed to file a motion to alter or amend judgment under Federal Rule of Civil Procedure 59. As Schulman explained to Mr. Tabler in a March 5 letter, "once there is a ruling on the Rule 59 motion, I will take no further steps to prolong the process." A1016. Schulman and Jasuta filed the Rule 59 motion on March 7, principally arguing that use of the opt-in provisions was error. Mot. Alter or Amend J. under

Fed. R. Civ. P. 59, March 7, 2012, ECF No. 42. Informed by Wiercioch's *Maples* argument, they argued that application of the extraordinary opt-in provisions made a difference because, under ordinary procedural bar rules, their state court performance would provide cause for his client's failure to raise claims. The motion was candid in describing their failures:

> Applicant's competency was never adjudicated in an adversarial setting. No one at the state-court hearing advocated that Applicant was incompetent, nor did anyone advocate that Applicant's waiver was involuntary. In short, the Court should have found that the lack of an adversarial process in state court caused by counsel's conflicting loyalties (which Maples found equivalent to attorney abandonment) satisfied the cause-and-prejudice standard and permitted the Court to review the merits of Applicant's unexhausted claims.

Id. at 5-6.

Despite this seeming admission, Schulman and Jasuta continued to deny that there was a conflict: "John and I are not comfortable with the motion [to withdraw] as originally drafted. We do not agree that there is/was a conflict, or that we went along with Richard's desire to drop his actions in State court." A1024. On March 29, 2012, Schulman and Jasuta filed the motion to withdraw. Mot. to Withdraw as Counsel & for Appointment of New Counsel, March 29, 2012, ECF No. 46. In that motion, Schulman and Jasuta argued that new counsel needed to offer unconflicted arguments about the impact of *Martinez v. Ryan* on the Court's decision. The motion contended that *Martinez*, decided just nine days earlier, might "provide[] a legal avenue . . . to pursue procedurally defaulted claims in federal court by arguing that state habeas counsel were ineffective." On April 4, 2012, this Court denied the Rule 59 and withdrawal motions. Order, April, 4, 2012, ECF No. 47.

142. Schulman and Jasuta remained resolute that they would not pursue an appeal. Schulman reached out to William Zapalac of the Clerk's Office of the Fifth Circuit to see if that court would permit substitution of counsel. Schulman confessed, "I would like to have another attorney appointed so (to be candid) John and I don't have to deal with the issue" of

filing a notice of appeal. Schulman took a ten-day vacation to Canada. When he returned, Rountree and Wiercioch had recruited new counsel, Marcia Widder, to step in for Schulman and Jasuta. On April 27, Schulman and Jasuta filed a renewed motion to withdraw. Renewed Mot. to Withdraw as Counsel & for Appointment of New Counsel, April 27, 2012, ECF No. 48. On May 1, 2012, this Court granted the motion. Order, May 1, 2012, ECF No. 51.

E. The Evidence That Could Have Been Developed and Presented at Trial and in State Habeas Proceedings

143. If trial or state habeas counsel had conducted an independent social history investigation, they could have compiled a complete account of Mr. Tabler's background and upbringing. With that account, along with the evidence they already possessed, they could have obtained opinions from medical and mental health experts that would have supported the strategy that they had chosen.

1. Background Information

144. Prior counsel never learned the full, highly mitigating story of Mr. Tabler's birth, upbringing, and youth. The report of Colleen Francis details the readily available evidence, gleaned from thorough collection and review of records and interviews of many witnesses, that counsel could have uncovered at the time of trial or during subsequent proceedings. A426. Before trial, Lorraine Tabler and Kristina Martinez (Richard Tabler's mother and sister) received one visit from a defense team member, and on one occasion met with trial counsel, Mr. Harris, at his office. Robert Tabler (Richard Tabler's father), Lorraine, and Kristina each received a phone call from a defense expert. Otherwise, none of the potential witnesses interviewed had any contact with any member of Richard Tabler's defense teams until Ms. Francis and her colleagues visited them in 2015.

a. Family Background

145. Richard Tabler was born into a family that included his father, his mother, an older brother, and an older sister. Although, as described below, his parents had a strained, violent marriage and neglected the children, he and his sister Kristina had a strong bond. Richard had an affectionate, loving temperament. His parents were able to provide the children with a roof over their heads, food on the table, and clothing to wear, along with some frills. For many children, that would have been enough – and for his older siblings, it was enough – to grow into capable adults.

146. But Richard was not like most children. He was born with two independent congenital birth defects, Klinefelter's Syndrome (or "extra X" chromosome syndrome) and fetal alcohol spectrum disorder associated with his mother's alcohol use during pregnancy. Both defects prevented his brain from developing normally in utero, and each triggered other hormonal, developmental, and physical problems. He grew extremely tall, although his father and brothers are short men. His voice never changed and his beard never developed. He had early, severe, dental problems. Most significantly, Richard displayed from his earliest years a profound inability to control emotions or moderate his impulses. He suffered tantrums and wild mood swings, like a toddler, long after he had stopped being a toddler. He could not learn the language of social interaction and often behaved in inappropriate ways.

147. His family could not handle him, and eventually they gave up trying. His parents' marriage, buffeted by infidelity, heavy drinking, violence, and neglect of the children, fell apart when Richard was nine. His mother moved in and out of the home and later around the country. His father and older siblings gave Richard little supervision. The unhealthy family dynamics interacted with Richard's congenital defects to spawn secondary disorders. Professionals who evaluated him in his teens and twenties, including prison professionals with

no reason to exaggerate his problems, diagnosed bipolar disorder, borderline personality disorder, and severe attention deficit disorder.

148. Richard's mother twice let Richard live with her as a teenager, but she quickly gave up on him and sent him back to his father. His father got him counseling and shuttled him in and out of schools, but by the time Richard was seventeen, shifted him from home to residential treatment and then to an apartment of his own where he expected Richard to live independently as an adult. Richard could not do it. By his early twenties he was homeless, his upper teeth had rotted and fallen out, his arms bore the scars of cutting and repeated suicide attempts, and he had fallen into alcohol and drug abuse.

149. An independent social history investigation would have uncovered the following information.

150. Richard Tabler, the fourth child of Lorraine Tabler, was born on February 5, 1979. His birth certificate reflects his low birth weight of 6.3 pounds. He was 20 inches long, with a head circumference of 30.5 centimeters. His mother remembers that he had a complicated birth. The new baby was blue, almost black, when he was placed on her chest. A430.

151. As Richard grew, his appearance differed dramatically from that of his parents.

> Richard is over six feet tall and Robert Tabler is 5'7". Richard's complexion and hair color are also very different from his father. Richard has blond hair and a fair complexion. His father has dark brown hair and a medium complexion. None of these differences can be reconciled when you consider the appearance of Richard's mother. Lorraine is Jamaican. She is a petite woman, with dark hair and a medium complexion.

A431.

152. Richard's parents had an unhappy marriage, marked by extra-marital affairs, and there was a widespread suspicion that Richard is not the son of Lorraine's husband, Robert

Tabler. A431. Robert and Lorraine Tabler fought over his habit of staying out late and coming home drunk, or not coming home at all. There were physically violent fights in which Lorraine pulled Robert by the hair and slammed his head into a door frame. A friend recalls Lorraine arriving for a visit with a black eye. A431-32. Lorraine had wild mood swings; before Richard's birth, she had been hospitalized for mental health treatment and had attempted suicide. A432-33.

153. Alcoholism ran in Robert's and Lorraine's families. Lorraine acknowledges that she drank while pregnant with Richard:

> Lorraine drank repeatedly during her pregnancy with Richard. She recalls drinking within two months of Richard's birth. While pregnant with Richard, Lorraine suspected that Robert was out cheating on her. She loaded Sean and Kristina up in the car and found Robert at a hotel, drinking heavily, dancing and making out with one of his secretaries. Lorraine confronted Robert and "punched him out." Robert didn't return home that night. Lorraine was furious and piled his clothes near the front door. Shortly thereafter Lorraine confided in her friend, Susan Girard (formerly Susan Valdes), about what happened. Both Lorraine and Susan remember Lorraine drinking heavily and being very upset about what transpired. Lorraine was pregnant with Richard during this ordeal. Susan recalls, "Lorraine was crying and carrying on. She had hunted him all over the place. She was drinking, she was feeling bad. There was a big commotion. She drank a whole bottle of liquor that night. It was near the beginning of our relationship. She was pregnant with Richard at the time. I can see how Richard could be an alcohol baby." Robert also confirmed that Lorraine drank during her pregnancy with Richard.
>
> Lorraine had unusual physical reactions when she drank alcohol, including splotchy skin, labored breathing, and fevers. She recalls that she had at least one of these reactions while pregnant with Richard.

A433.

154. Both parents were violent to the children, especially Lorraine, who shoved them into door frames and beat them with branches. Lorraine was neglectful. Richard's sister Kristina, who was not quite seven when Richard was born, was his primary caregiver. His crib was in her room. She tended him when he cried during the night, and made him peanut butter

and jelly or macaroni and cheese for meals. She put him down for naps and rocked him to sleep. A436-37. When Richard reached school age, friends, neighbors, and school teachers noticed that he was often unsupervised, bicycling 2 ½ miles to a friend's house as a second-grader and hanging around his elementary school grounds after 6 PM. A teacher often gave him lunch money or fed him after school. A438, 447.

155. As Lorraine's and Robert's marriage deteriorated, Lorraine began to disappear. She would leave for Jamaica (her birthplace) or elsewhere, without telling her family when she would return.

> Lorraine's behavior affected Richard greatly. He felt abandoned and to blame for his mother's decision to leave. When Lorraine walked out on her family after an argument with Bob, it was the beginning of a stretch of time in which she had little and sporadic contact with the children. It was also the first time Richard realized his parents were separating, a rift for which he blamed himself. In a pre-trial court assessment, Richard recalled the day his mother left: "My mom came out of the garage, got in her car and was backing up. And I ran out to my mom and I said, Where are you going? Where are you going? Can I come too? She said no. I'm not coming back … so that's when my parents divorced. So I've felt from that time, that whole time that my parents have been divorced, that it has been my fault." Kristina also remembers this scene. "I think Richard had followed out after her and wanted to go with her, didn't want to stay with my dad and was very upset and I think my mom couldn't take him and she was so emotionally upset with what was going on with my dad … she had slammed the door in Richard's face telling him that she -- that he couldn't go with her." Lorraine also has a vivid memory of that day, seeing her youngest child come running to her car window, begging her to take him with her. "I just told him I couldn't. And he started to cry and I told him I just couldn't, you know, couldn't afford to take him and I drove away. He was crying, hanging onto the car." She said, looking back now, that this experience clearly increased his "agitation" and moodiness. "He was very angry at me for a long time because he figured I left him, which I basically did."

A434-35.

156. Lorraine sought a divorce from Robert Tabler in 1991. She requested joint legal and physical custody of Richard, with visitation rights. Thereafter, she moved frequently from

one place to another in California, Florida, Las Vegas, and Texas. She had a series of men friends, some of them violent.

> In January 1993, Robert Tabler relinquished custody of 13-year-old Richard to Lorraine, who was living in Florida. Lorraine said this was because a therapist suggested Richard needed his mother to be more involved in his life. Richard lived with Lorraine less three months before Lorraine shipped him back to California, having no patience for his problems or the toll he was taking on her personal life. "Oh, him and I got into it. He was coming to my work every other minute just to be where I was," Lorraine said. At that time, Lorraine was intimately involved with Jeff Compton, a neighbor 20 years her junior, and usually left Richard in the care of Jeff's nephew. Richard was largely truant from school, and Lorraine did not encourage or facilitate his attendance. Richard was almost completely unsupervised. This incident is detailed in Dr. Mark Henigan's notes as "Went to FLA for Jan '93 back → , a couple of suspensions, fights, last two months just hanging around house. Not much structure."

A450-51. Although Richard also spent part of the year he was in the tenth grade in Las Vegas with his mother, he spent the rest of his childhood in his father's custody. A458-462. Kristina was soon out of the house, and Richard was largely on his own. A456.

b. Developmental history

157. Richard's developmentally inappropriate behavior was apparent from earliest childhood. Although he had an affectionate temperament (A455, 466), he could not regulate his behavior or adapt to expectations. He suffered from unmanageable tantrums:

> Richard was uncontrollable as a child. As a toddler, before he could really speak, he habitually held his breath until he passed out. He did this when he was mad and also when he wasn't getting attention. Observers remember he had a fit of rage, his eyes rolled back in his head and he fainted and fell to the floor. Richard was completely out of it and had to be woken up. Richard threw infant-like tantrums well into childhood. They sometimes went on for hours. There was no way to soothe him or calm him down. Susan Girard and her daughter Brandi Drewry visited the family in Turlock when Richard was in elementary school, and he threw a fit which was described as "uncontrollable, inconsolable, on the floor, screaming fit – like you see toddlers do." From their perspective Richard had failed to mature or change at all in the years since they last saw him.

A442.

158. Richard was always skinny and tall, with a high-pitched voice and laugh. At what should have been the age of puberty, his voice did not change and his facial hair did not develop. A441. He was slow to walk and so slow to talk that adults assumed he was deaf or intellectually disabled. He had poor hygiene, resisting showers and brushing teeth. He sucked on two fingers almost constantly from infancy until well into his teens. He wet the bed until he was eight. A441-42. He laughed or showed no reaction to beatings or scoldings. A443.

c. Educational History

159. Richard struggled throughout his school years, progressing from poor performance in elementary school to failure in secondary school. He switched schools often and attended sporadically:

> Richard attended Crane (K, 1), Julien (2) and Brown Elementary (3-6) Schools in Turlock, CA. He then attended Turlock Junior High and Ft. Myers Middle School, in Ft. Myers, FL (7). He attended Turlock High School (9), Sunset High School West, in Las Vegas, NV, and Roselawn Continuation High School in Turlock, CA (10), and Stanislaus County School, Turlock, CA (11). It appears he withdrew from school entirely on October 15, 1996, earning no grades that year (12). There is no indication he ever received his diploma or GED. From what can be gleaned from the school records and witness interviews, Richard's attendance in school was always poor - particularly from grades 7 and up. Sean and Kristina both describe his involvement in school beyond elementary as minimal. Sean reports, "He never wanted to go to school. He got expelled and suspended. I don't know if he went to junior high at all. He wasn't there a lot if he did go. He became an outcast." Kristina confirms this, "Richard did poorly in school. I don't think he even did a full year in junior high. His education level? At best, sixth grade. He was a typical kid who fell through the cracks. He needed teacher's help. Instead of failing him they pushed him on to the next grade. I think he did one year of high school, maybe."
>
> There is no indication in any of the school records reviewed that Richard ever attended the 8th grade. Inexplicably, he last attended Ft. Myers Middle School enrolled as a 7th grader. He withdrew early on March 8, 1993, and is next noted to attend 9th grade at Turlock High School in the fall of 1993. He flunked every single subject in both the spring and fall semester of 1993.

A444-45.

160. Richard's elementary school teachers remember his "classic ADHD" behavior, his poor performance, and poor grades. Several recall with concern that their school offered no services for children like him. Teachers and school administrators worried about his evident emotional problems and lack of home supervision. Richard did not know how to behave socially to get along with his classmates. A445-48.

161. In the fifth grade, Richard received C's, D's, and F's, although his teacher, Kent Dotson, did not think of himself as a hard grader. Mr. Dotson wrote in his grade card comments "I'm really worried about what's happening with Rich. He has lots of good qualities. Maybe some counseling would help." Richard Tabler was one of the most troubled children Mr. Dotson ever taught. A445.

> Dotson states, "I was truly concerned about his home life. I don't remember either of his parents in any context. He spent a lot of time in my classroom after school had ended. He mostly just talked – he was clingy, needy. I think that he wanted to feel needed – he was looking for validation, his importance as a human being. He didn't have parental support at home." Richard struggled in his interactions with other students. Dotson states, "He had trouble controlling his emotions, by the time he got to me his problems were well-developed. He was not accepted by other students. He didn't have the skill set to get along with his classmates." In terms of his performance in class Dotson notes, "He didn't get work turned in. In class you never felt like he was there. He had very little interest in learning … he didn't follow directions well. He was floating off into his own world, for sure. You'd be doing a lesson and he'd be off somewhere else – not really there." Mr. Dotson remembers that Richard often shared inappropriate information with the teachers and other students. Richard also laughed at inappropriate times. Richard was often hyper and excited but also couldn't get enthused about anything happening in the classroom. Richard was fidgety and was often out of his seat for no reason. Richard talked out of turn and often blurted out answers – wrong answers – in class. "Richard was like that character from Peanuts with the cloud over his head. He was much more like that than a happy, outgoing kid. At his core he was an unhappy, lonely child."

A446.

162. Richard's sixth grade teacher, Karen Grenbeaux, stated in her grade card comments, "Richard is not working. He doesn't hand in assignments, shows no interest in

lectures and his frequent absences causes his [sic] to miss major concepts of sixth grade skills. Richard's frequent absences are a major setback to his educational progress. He needs to be in school every day!"

> Karen Grenbeaux recalls now, "He was your classic ADHD kid. There were no resources at Brown for kids like that. Richard was constantly sharpening his pencil, not focusing in class, dropping his pencil on the floor, tapping someone as they walked by, the classic behaviors." Grenbeaux said that Richard wanted to communicate and be around other people but that he struggled with that. "I don't remember him having a single friend. He was lonely and craving kindness from others. He wanted a mother figure and he didn't have one. I got the impression Richard was left to raise himself."

A447.

163. Richard performed abysmally on standardized tests administered in the sixth grade. In seven of ten areas tested, he performed at a single-digit percentile level compared to students locally. His percentile scores were: 1%, 3%, 3%, 4%, 4%, 9%, 9%, 12%, 13%, and 14%. A447.

164. Brenda Benton, who worked in the school office, remembers Richard's socially inappropriate behavior and lack of home supervision:

> Administrators at Brown Elementary were also concerned about Richard. Brenda Benton worked in the central office. She remembers Richard frequently riding his bike outside the school at 6 pm and no one looking after him. Brenda believes that when she saw him out well after school was out that his father wasn't home and that he may have been locked out of the home. On numerous occasions she gave him food after school and lunch money during school when he was in need. She recalls that Richard often imagined relationships that in fact were non-existent. "He created problems for himself. He pretended he had a good friend or somebody was a really good friend – they wouldn't have anything to do with him." "There was a greater need in Richard than other kids to be accepted, to impress and be liked by others. He acted out to get attention. He had nothing to impress people with." Brenda remembers that Richard tried to participate in outside activities at school. "But if someone slighted him or bumped him inadvertently he would initiate a physical altercation. He acted on impulse. He didn't pay attention to whether it was on purpose."

A447-48.

165. Although classmates remembered that Richard had a "good heart," and wanted other children to accept him, they also remembered that he created problems for himself with a lack of boundaries or impulse controls. He would snap if he felt insulted and then feel sorry later. A448-49.

166. With one exception, Richard received failing grades in each semester throughout his secondary school years. On standardized tests performed when he was in the ninth grade, he scored at the lowest fifth percentile or lower compared to students nationally. A449-50.

d. Mental Health/Drug and Alcohol Abuse History

167. Richard developed mental health symptoms early, landed in emergency rooms and mental health treatments many times beginning in early adolescence, and abused drugs and alcohol beginning at an early age. He made many documented, bloody, and dramatic suicide attempts. He sister Kristina recalls:

> [H]e was depressed and anxious even as a young child, particularly after Robert and Lorraine separated. Kristina recalls, "He followed anyone, anywhere, always clinging." He also frequently tried to run away from home. A psychiatric progress note from September 12, 1994, notes that Richard, at age 15, "stole" a motorcycle and ran away from his home with Robert to his mother's home in Las Vegas, NV. As detailed below, at the age of 16, he traveled by bus to Portland, Oregon, to see his brother Greg Widen, showing up unannounced.

A450.

168. In May 1993, once his mother had shipped him back to his father after only three months living with her in Florida, fourteen-year-old Richard began receiving treatment from Dr. Mark Henigan, a child psychiatrist. Dr. Henigan saw Richard for eighteen months. A questionnaire that Robert Tabler completed for Dr. Henigan vividly described Richard's disturbing behavior.

> Robert answered "*A Lot*" to the following questions: 1) Has your child felt Sad, Blue, Moody, Down in the Dumps or Irritable? 5) Has he/she called himself stupid, ugly, a bad person, or criticized himself? 6) Has he/she recently had unusual trouble thinking or concentrating? 7) Does he/she complain or seem bored, without interest in things? 17) Has he/she ever tried to kill himself or hurt himself in any way? If so, when? What did he/she do? To this last question Robert wrote "Threats for Attention, Knife/Motorcycle." 29) Does he/she refuse to go to school (or get sick) in order to stay home with parents? 32) Does he/she have difficulty leaving you at bedtime or difficulty sleeping alone? 35) Does your child violate rules at home or school, b) have temper tantrums, c) have trouble listening, d) try to make you angry, e) talk back? 36) Does the child a) have trouble finishing tasks, b) have trouble listening, c) have trouble keeping his mind on what he is doing (concentrating), d) have problem planning or organizing work?

A451-52.

169. At the beginning of treatment, Dr. Henigan diagnosed Richard with depression and oppositional disorder; after a year and a half of treatment and testing, he added a diagnosis of severe attention deficit/hyperactivity disorder. At different times, Dr. Henigan prescribed Imipramine, Prozac, and Wellbutrin.[18] A458. Richard's high school records also reflect the ADHD diagnosis. As a tenth grader living with his mother in Las Vegas, his health inventory form gave him a disability code, J, for ADHD, and noted that he could not take PE and was receiving medication, namely "Wellburtin" [sic]. A450.

170. Dr. Henigan's notes indicate that, toward the end of treatment, Robert was no longer willing to work with Richard and his problems. "Father feel[sic] like he wash [sic] his hands of the problems his son is having." Dr. Henigan recommended that Richard receive residential treatment, and noted that Robert was assembling services for him. A453. For a

[18] Imipramine is commonly used to treat depression, and is used to treat bed-wetting in children. *See* http://www.pdr.net/pdr-consumer-monograph/tofranil-tablets?druglabelid=1609&ConsumerId=5213#1 (visited 8/16/2015). Prozac is commonly used to treat both major depressive disorder and the depression associated with bipolar disorder. *See* http://www.pdr.net/pdr-consumer-monograph/prozac?druglabelid=3205&ConsumerId=1362#1 (visited 8/16/2015). Wellbutrin is commonly used to treat depression. *See* http://www.pdr.net/pdr-consumer-monograph/wellbutrin?druglabelid=237&ConsumerId=5227#1 (visited 8/16/2015).

time, when Richard was about seventeen, Robert supported him in an apartment of his own (A456), but that soon ended and Richard bounced from state to state with no family support.

171. As a teenager and a young man, Richard was known for his very impulsive behavior and mood swings. Dr. Henigan recalls him now as a "really impulsive kid" who once kicked him in the groin. According to Kristina, Richard's moods cycled rapidly from very loving, to angry and reactive, to apologetic, to loving and sweet again. She could never tell when the cycle was coming. "It was just like a light switch." His brother Greg describes Richard's unannounced arrival at his home in Oregon, when he was sixteen. Richard had decided to pick up and travel there on short notice and without telling anyone he was going. A454-55.

172. Over the years, Richard made at least twelve documented suicide attempts. He received treatment, often in emergency rooms, for ulcers, unexplained episodes of unresponsiveness, drug overdoses, and supposedly accidental lacerations of his arm. A454-64. Among other incidents, records describe the following:

- In 1995, shortly after Richard received a diagnosis of ADHD and Kristina moved out of the house, he yelled at and hit his father in an argument, and then threatened to kill himself with a BB gun.
- In December 1995, at age 16, Richard was treated at the Emanuel Medical Center in Turlock, CA for self-inflicted knife wounds to the left arm.
- In 1999, he made 20 cuts on his left arm. By this time, the notes report, Richard had "burnt out all of his family and friends. He is currently homeless."
- Also in 1999, he held a handgun to his head in front of church friends, threatening to shoot himself. Responding police shot him with a bean bag gun.

- Still later in 1999, Richard barricaded himself in an apartment in Florida with a loaded handgun, threatening to shoot himself. It took a SWAT team three hours to coax him out.
- In 2000, he was admitted to a hospital in Fort Myers, Florida, after lacerating his left forearm and right thigh.

173. Jail and prison records reflect Richard's severe disorders. For example:

> [In 2000] Richard was [] arrested on a charge of receiving stolen property, with non-controlling offenses of commercial burglary and forgery, and ultimately received a sentence of three years and four months in the California Department of Corrections. Richard's incarceration provided the lengthiest and most focused period of mental health observation in his life. In April 2001, Richard wrote a letter to one of his prison counselors trying to explain his depression: "I have no friends, as I sit here in the hole at CMC-East a place I never thought to be. I see my life falling away from myself despretly *[sic]*. No matter how hard I try to win myself back I'll never be able to cause *[sic]* the struggle to go on to what I once wanted to do is nothing but a dream that I'll never be able to do." Richard had a psychological evaluation in May 2001 after cutting both of his wrists with a razor he smuggled in under his tongue, suffering from ongoing suicidal ideations. In addition to a "past medical history notable for prior ADHD as a child," doctors remarked that Richard was a "very young appearing white male who appears much younger than his stated age due to his appearance and immaturity." He reported four prior suicide attempts in his life and self-inflicted cutting starting at age 11. "I know that I need help. I'm screwed up. I have mood swings," he said. In July 2001, Richard requested to be moved to Atascadero State Hospital within the DOC following suicidal thoughts, stating, "Things have not been the same since age 13." He reported auditory hallucinations directing him to kill himself, and doctors began administering Haldol injections. Richard had trouble identifying signs of his oncoming depression to the doctors apart from physical manifestations, such as wanting a cigarette, and an involuntary flexing of his jaw. "I can't answer that, that's the problem. I freeze up and don't know the answers," he told them. He expressed a lot of verbal anger towards "child molesters." In August of 2001, the DOC moved Richard to Atascadero State Hospital, flagging him as a prisoner whose rehabilitation would be expedited by focused treatment of his mental health problems.

A462-63. Atascadero State Hospital personnel diagnosed him on admission with Bipolar Disorder NOS; Major Depression, Recurrent Severe; and Borderline Personality Disorder. He received similar diagnoses in 2003, while he was briefly in custody in Fort Myers, Florida, and was diagnosed as "bipolar," with a notation that he was a "cutter." A463.

174. Several people who knew Richard in the years and months before the homicides recall his wild mood swings, neediness, and serious drug and alcohol abuse. A465-69.

e. History of Head Injuries

175. In addition to all of Richard's other medical and mental disorders, he suffered several documented head injuries, including a severe, documented concussion, with facial fractures, two months before the offense. He fell 20-30 feet from a tree in Florida at age fourteen and injured his head, and also had a bicycle accident with head injury that same year. He had a serious motor vehicle accident involving cuts to his head at age eighteen, had another bicycle accident, and was assaulted at least twice while in prison in California, with head injuries. A469-70.

> Two months before events of this case, in September 2004, when Richard was 25 years old, he was carjacked and hit in the head by a man wearing brass knuckles. He suffered a concussion, vision loss, head pain, confusion and memory loss. He received treatment at Adventist Medical Center and Oregon Health and Science University Hospital in Portland, OR. He was treated for a closed head injury with concussion and tripod facial fractures. The radiologist also noted other "chronic appearing fractures," on Richard's nose, a "possible prior left inferior orbital wall fracture," and a fracture of the left cheekbone of an indeterminate age. When Richard was supposed to return for an oral maxillofacial surgery eight days after the assault, he did not appear, and instead showed up at his church, "acting inappropriately and somewhat confused." Paramedics were called and he was then evaluated for his altered mental status. "The patient is complaining of severe headaches…he has been unable to eat secondary to his jaw pain…episode of vomiting…he thinks that it is August as opposed to September…he has been unable to sleep…he feels he is having memory loss…"

A471.

2. Medical and Mental Health Evidence

176. Thorough background investigation and trial preparation could have informed trial counsel's mental health presentation, and could have led them to secure appropriate *medical* evaluations. Trial counsel – and therefore the jury – never learned that Mr. Tabler suffers from Klinefelter's Syndrome and Fetal Alcohol Spectrum Disorder. The mental health

experts whom counsel consulted, three of whom testified at trial, were unaware of these diagnoses and of the background information that an independent social history investigation would have revealed.

a. Klinefelter's Syndrome

177. Mr. Tabler has a distinctive appearance. He is unusually tall (over six feet), with a thin undeveloped build, elongated fingers, a high-pitched speaking voice and laugh, and little facial hair. A589 (Martell report); A632 (Davies report); A649 (Dudley report).

178. Carole A. Samango-Sprouse, Ed.D., is an Associate Clinical Professor of Pediatrics at The George Washington University and director of the Neurodevelopmental Diagnostic Center for Young Children in Crofton, Maryland. She is a published expert in Klinefelter's Syndrome (also called 47,XXY Syndrome). After hearing about observations of Mr. Tabler's appearance during a mental health evaluation and reviewing a photograph of him, Dr. Samango-Sprouse recommended chromosomal testing. The testing, completed on August 14, 2015, determined that Mr. Tabler possesses an extra X chromosome and has Klinefelter's Syndrome. A601, 609.

179. Klinefelter's Syndrome is a neurogenetic disorder characterized by deficient production of the androgen class of hormones, which affect all aspects of central nervous system development from prenatal life through adulthood. The disorder requires lifelong treatment. It is the most common form of sex chromosome aneuploidy (extra chromosome), and occurs in about 1 of 660 live male births. A601. It can have a debilitating effect on neurological, social, and intellectual development:

> Multiple behavioral manifestations and central nervous system dysfunctions are commonly associated with this syndrome, if untreated, including decreased impulse control, heightened anxiety, mood lability, low frustration tolerance, depression, and executive function impairment. Richard Tabler has many if not all of these symptoms[.]

A601.

180. Physically, individuals with Klinefelter's have diminished hormone and sperm production and tall stature. The condition is also associated with hypotonia (low muscle tone), language-based learning disabilities, speech delays, and cognitive defects coupled with atypical brain development. A601. Studies have also shown that boys with Klinefelter's have reduced total brain volumes and reduced volumes in the frontal, temporal, and caudate regions.

> When reduced total cerebral volume is accounted for, temporal gray matter in boys with XXY is significantly smaller than temporal gray matter in typically developing boys. Temporal lobes are associated with language capacities including reading, social language, and processing of spoken information[.]

A603.

181. Furthermore, brain MRIs on boys with Klinefelter's show thinner cortexes in the temporal, frontal, and superior motor regions of the brain, which may account for the diminished muscle tone and the impaired control of muscles necessary for speech typical of the disorder. A603.

> Cortical thinning in these specific brain regions has been postulated to impact language comprehension, emotion association, processing sensory input, reward, attention, short-term memory, and planning in boys with XXY. . . .

A604.

182. Without treatment, men with Klinefelter's Syndrome have hormonal imbalances associated with lability (mood swings), low frustration tolerance, and depression, along with other symptoms. A602. Early intervention and treatment, however, including early hormonal treatment in infancy and hormonal booster therapy and testosterone therapy in adolescence, can effectively moderate the social, behavioral, cognitive, and physical effects of the disorder. A602, 603.

183. Dr. Samango-Sprouse found that Mr. Tabler showed many neurodevelopmental symptoms "highly associated" with Klinefelter's, beginning in his first five years of life:

- He was slow to walk and talk, leaving some to assume he was deaf and others to assume he was intellectually disabled;
- He was a toddler before he could speak well, and even then struggled to get words out;
- He would rarely engage with other children;
- As an older child, he behaved like a "classic ADHD kid," fidgety, "hyper," and unable to focus;
- He lacked impulse control and had insufficient interpersonal boundaries;
- He was extremely anxious and "antsy."

A602.

184. Mr. Tabler's condition made him exceptionally vulnerable to the effects of his neglectful and violent home life. His mother drank during pregnancy and the children were neglected. "Loneliness and feelings of abandonment are motifs that continue[d] through every stage of Richard's life." Young Richard's atypical development left him vulnerable to abuse. And the neglect and abuse had a more severe impact on him than it would have on a typically developing child because of the emotional dysregulation, anxiety, and depression to which his disorder made him susceptible. A602.

185. Mr. Tabler's multiple documented suicide attempts, suicide threats, and episodes of self-harm reflected the heightened anxiety highly associated with Klinefelter's. A603.

186. Dr. Samango-Sprouse concluded that Mr. Tabler's "very, very late" diagnosis and chaotic childhood "compromised his outcome tremendously" and may have significantly compromised his judgment. She believed that brain imaging might increase understanding of how his condition affected his functioning and development. A604.

b. Fetal Alcohol Spectrum Disorder

187. At the time of trial, counsel could have consulted experts such as Natalie Novick Brown, Ph.D., and Julian Davies, M.D. Dr. Brown is a clinical and forensic psychologist with specialized training and experience in fetal alcohol spectrum disorders ("FASD") and the program director and chief psychologist at FASDExperts. A515, 561. She conducted a five-hour evaluation of Mr. Tabler, administered tests of suggestibility and malingering to him, and supervised the administration of adaptive behavior and executive functioning questionnaires to his sister. A516. Dr. Davies is a board-certified pediatrician, a fellow of the American Academy of Pediatrics. He is a clinical professor of pediatrics at the University of Washington School of Medicine. A620, 640. He evaluates children and adults at the longest-running FASD diagnostic clinic in the country. A620. Dr. Davies conducted a physical examination and evaluation of Mr. Tabler and administered a screening test of neurocognitive functioning.

188. Fetal Alcohol Spectrum Disorder, or FASD, "is the umbrella term for conditions arising from prenatal brain damage to a developing embryo or fetus caused by maternal drinking during pregnancy." It has a worldwide diagnostic history spanning over 40 years. Diagnostic criteria have existed in the literature since the late 1970s, and the Institute of Medicine, an arm of the National Research Council, published criteria in 1996. A516, 550-54. The University of Washington has published a widely used four-digit code, and criteria also appear in the Diagnostic and Statistical Manual, 5th edition, of the American Psychiatric Association. A620.

189. At one end of the FASD spectrum is Fetal Alcohol Syndrome ("FAS") characterized by prenatal and/or postnatal growth deficiency, facial anomalies, and central nervous system ("CNS") abnormalities. A619. Also on the spectrum is Static Encephalopathy

– Alcohol Exposed (University of Washington terminology) or Alcohol Related Neurodevelopmental Disorder ("ARND") (Institute of Medicine terminology), which does not involve facial abnormalities or growth delay but does involve confirmed maternal drinking and CNS abnormality. A620. The vast majority of those on the FASD spectrum have ARND. A520.

190. Mr. Tabler falls on the FASD spectrum and has ARND.

191. Dr. Natalie Novick Brown conducted a five-hour evaluation of Mr. Tabler, administered tests, and reviewed records, including school, medical, mental health, and correctional records and the records of neuropsychological testing conducted during trial preparation and during state habeas proceedings and the report on an EEG test conducted before trial. A516-18. She identified robust indications, in the evidence possessed by trial counsel in 2007, that Mr. Tabler suffers from FASD:

- His father reported to Dr. Henigan, Mr. Tabler's treating psychiatrist, that his mother drank alcohol during her pregnancy.
- In second grade (the earliest year for which records were, or are, available), Mr. Tabler was already a year older than his classmates, suggesting that he may have been retained in school.
- His elementary school performance was poor and, by sixth grade, he performed 1-2 standard deviations below the mean in all academic subjects on standardized tests.
- He had a record of academic failure in secondary school, took remedial classes, was placed in alternative schooling, and performed below the tenth percentile level on standardized tests administered in 9th grade.

- The electroencephalogram (EEG) performed in 2005 under the supervision of Dr. Myer Proler showed that Mr. Tabler had neurological impairment in the frontal-temporal region.
- Dr. Henigan's records contain numerous reports from Mr. Tabler's father about his son's executive dysfunction (inability to complete tasks or organize work, or to control moods, attention, impulses or behavior)
- Dr. Henigan administered a test of executive capacity to control attention and diagnosed Mr. Tabler with a severe attention deficit.
- Neuropsychological testing administered in 2006 revealed a scattered pattern that included "pervasive deficits in six cognitive domains: (1) intellectual (33-point discrepancy between verbal and performance IQ scores); (2) learning disability in math; (3) nonverbal memory deficit; (4) deficit in visual-spatial integration; (5) deficit in motor skills; and (6) executive functioning deficits in working memory and verbal reasoning."

A537-43.

192. Dr. Brown explained:

> [A]t the time of trial, not only did Dr. Milam's test results provide neuropsychological evidence of functional impairments in cognitive domains directly relevant to offense conduct (i.e., executive functioning), those test results were consistent with Dr. Proler's EEG report in 2005, which provided reliable *independent* evidence of neurological dysfunction and probably brain damage in the areas of the brain that control executive functioning and consequential adaptive behavior (e.g., learning and social conduct). School records (which contained consistent evidence of a severe learning disability and executive functioning problems) and medical records (which contains evidence of adaptive coping deficits such as ongoing thumb sucking, temper tantrums, truancy because he was "afraid of school" and "afraid of writing in front of others") were consistent with both the neuropsychological test results and the EEG report.

A543-44.

193. The records in trial counsel's possession also set forth a history consistent with the "secondary disabilities" common among individuals with FASD: failure to complete school, trouble with the law, substance abuse problems and complex mental health problems, inability to live independently, and inability to maintain employment. A544-45.

194. Thus, at the time of trial, counsel had both Robert Tabler's report that Lorraine Tabler drank during her pregnancy with Richard and several independent sources of evidence of Richard's CNS dysfunction. An independent social history investigation would have uncovered a wealth of additional evidence from readily available witnesses:

- Lorraine Tabler admits to heavy drinking during the pregnancy, and her husband and two friends confirm her recollection. A545.
- Richard was developmentally delayed and his affect (emotional reaction) was often inappropriate to a situation. A545-46.
- His coping and self-soothing abilities were deficient and his social skills were delayed and awkward. His communication and daily living skills were impaired. A546.
- His teachers observed poor social skills and "classic ADHD" behavior. A546-47.

195. Further evidence that was available to trial counsel was developed during the state habeas proceedings. Dr. Harrison's neuropsychological testing found deficits in executive functioning and sensory-motor integration, and he observed a bilateral tremor in Mr. Tabler's hands. A486-503. His results were consistent with those Dr. Milam obtained in her own testing before trial. A549-50.

196. Experts in FASD were available to consult with trial and/or state habeas counsel in 2007-09. A554. A qualified expert could have reviewed the records, EEG, and neuropsychological test results, and could have evaluated Mr. Tabler and conducted additional

tests. If, for example, an expert had administered the Vineland Adaptive Behavior Scales-Second Edition, it would have disclosed a clear communication deficit and a deficit in coping skills during his childhood, both consistent with the peer-reviewed literature on FASD. A554-55. An expert could also have administered the Behavior Rating Inventory of Executive Function ("BRIEF"). Mr. Tabler earned many clinically elevated scores on the BRIEF in 2015, indicating mild to moderate impairments in five skill domains (inhibit, shift, emotion control, plan/organize, and working memory). "In the forensic context, the above deficits in executive functioning are equivalent to flawed recollection, reasoning, and impulse control." A556. Finally, an expert could have administered the Gudjonsson Suggestibility Scale, in which Mr. Tabler demonstrated a substantial impairment of his capacity to withstand influence from others. Indeed, Mr. Tabler's score on this test was the highest (i.e., the most suggestible) that Dr. Brown had ever seen after administering the test to hundreds of persons. A557-58.

197. Trial or post-conviction counsel could also have consulted a medical doctor qualified to conduct an FASD assessment. In 2015, Dr. Julian Davies conducted a physical examination and evaluation of Mr. Tabler, reviewed the reports of Drs. Brown, Samango-Sprouse, Proler, Milam, and Harrison, and reviewed records. A621-22, 629, 632. He concluded:

> Mr. Tabler has Static Encephalopathy / Alcohol Exposed, which is also called Alcohol-Related Neurodevelopmental Disorder (ARND). This is a diagnosis under the umbrella of Fetal Alcohol Spectrum Disorders (FASD). In layman's terms, Mr. Tabler has brain damage that is consistent with fetal alcohol impacts.

A620, 634.

198. Dr. Davies noted the reports and documentation that Lorraine Tabler drank during her pregnancy with Richard (A622), and identified multiple indicia of CNS abnormality. Some of the evidence was structural: Mr. Tabler's 2005 EEG exam was

abnormal, and he had microcephaly (an abnormally small head) at birth, with a head circumference at the 0 percentile. His head circumference currently, measured by Dr. Davies, is at the third percentile. A623, 627, 635. Other evidence was functional. Dr. Davies reviewed the neuropsychological test results of Dr. Milam (conducted before trial, in 2006), Dr. Harrison (conducted during state habeas proceedings, in 2008) and Dr. Daniel Martell (conducted in 2015). A627-28, A583. Collectively, these test results and other records demonstrated brain dysfunction in many domains: attention, learning, intellectual functioning, executive functions, memory, language, visuospatial integration, and motor. Mr. Tabler also demonstrated social misjudgment during his interview, with "an unusual mix of goofy . . . adolescent humor mixed with braggadocio" and distractibility, interrupting answers to mug for officers outside the interview room. A631.

> His "spotty" pattern of impairments is consistent with those seen in FASDs. In fact it is common in FASD to find what we call a "swiss cheese" pattern of deficits, with some intact or even above-average scores next to significant impairments.

A635.

199. Dr. Davies performed a brief cognitive screening examination and found that Mr. Tabler scored in the borderline range.

> His performance on this screening evaluation indicated potential problems in visuospatial skills, executive functioning, attention, impulse control, and language. Had this been the first testing he'd received, I would have recommended thorough testing by a psychologist. Indeed, such testing confirmed deficits in these areas of concern.

A632.

200. Dr. Davies noted that Mr. Tabler's impaired adaptive functioning is also typical of FASD:

> It is important to note that the gap between some of Mr. Tabler's more intact testing scores (such as Performance IQ), his lower-than-predicted grades, and his

> very dysfunctional young adult outcomes fits a pattern frequently seen in people with ARND. They can perform at a relatively higher level in a one-on-one, focussed [sic] testing environment, but have trouble translating that performance into the more complex environment of school, and have even more difficulty using their mental capacities in the less-structured life of an adolescent/young adult. They can perform more basic, rote skills but when complexity is introduced, or the need for abstract thought, interpretation, or judgment, their adaptive "real world" performance can be surprisingly impaired.
>
> Individuals like Mr. Tabler with ARND rather than full-blown FAS, and those with normal IQ rather than intellectual disability, are actually at higher risk for adverse life outcomes like confinement. This may be because they are less likely to receive an early diagnosis and appropriate supports, and go through life with an "invisible disability."

A635-36.

201. Dr. Davies also agreed with Dr. Samango-Sprouse that Mr. Tabler has Klinefelter's Syndrome. He noted hallmark characteristics on his physical examination:

> tall stature, eunuchoid body proportions (excessive arm span, low upper/lower segment ratio), undervirilization, tremor, and various skeletal findings. In addition, dental histories similar to Mr. Tabler's have been described in KS, likely due to the influence of extra X chromosomes on enamel formation.

A636-37. With earlier diagnosis, Mr. Tabler could have received treatment. A637.

202. Klinefelter's Syndrome and FASD share many common features. Significantly, in both, affected individuals are sensitive to the impact of risk factors in their environment. A637.

> It is not scientifically possible to definitively state what neurobehavioral deficits are due to KS versus FASD in Mr. Tabler, as both syndromes are variable in their impact and share common features: language and verbal processing difficulties, impulsivity, executive dysfunction, emotional lability, learning problems, and social challenges. These syndromes also share a sensitivity to environmental risk factors.
>
> If I were to speculate based on my clinical experience and review of the literature, Richard's low birth weight to height, microcephaly, level of ADHD, very low social emotional age, and degree of life dysfunction (secondary disabilities) are more characteristic of FASD than KS. There have been reports that men with KS are overrepresented in the criminal justice system, particularly if they lacked

> stable, supportive family environments and early diagnosis. The same is true of FASD, but to a greater degree.
>
> While it is tempting to choose the most parsimonious explanation for a patient's presentation, I do not find KS sufficient to explain his outcomes, and a diagnosis of KS *and* FASD is the best explanation for Mr. Tabler's medical and neurodevelopmental features.
>
> These diagnoses are indeed compatible - KS is a sex chromosome anomaly present from earliest gestation, and alcohol exposure during pregnancy compounds the genetic risk.

A638-39.

203. Dr. Davies concluded to a reasonable degree of medical certainty that Mr. Tabler has Static Encephalopathy/Alcohol Exposed, also known as ARND, and also has Klinefelter's Syndrome. Both were present at birth and compounded by adverse life experiences, head injuries, and the development of mental illness. Any qualified FASD professional could have reached this diagnosis at the time of Mr. Tabler's trial. A639.

c. Psychiatric Evaluation

204. The defense could also have consulted and presented the testimony of a psychiatrist who was armed with the results of an independent social history investigation *and* the opinions of experts in Mr. Tabler's medical disorders. Richard Dudley, M.D., conducted such an informed assessment. Dr. Dudley is a licensed physician board-certified in psychiatry by the American Board of Psychiatry and Neurology. He conducted an in-person psychiatric examination of Mr. Tabler and reviewed transcripts, records, the social history report of Colleen Francis, and the reports of Drs. Samango-Sprouse, Novick Brown, Davies, and Martell. A645-46.

205. Dr. Dudley noted several important features of Mr. Tabler's background and current functioning. He had been exposed to, and subjected to, domestic violence and remained extremely disturbed by his memories of the abuse. The absence of parental support,

amounting to abandonment, made him especially vulnerable, and his adolescent years were unstable with multiple moves. He had received a diagnosis of ADHD as a child. Mr. Tabler described to Dr. Dudley the maelstrom of overwhelming feelings in which he lived:

> He reported feeling extremely anxious and angry for as long as he can remember; he has never been able to rid himself of those feelings; and he cried as he noted that he has always felt near ready to explode, and that that has always terrified him. He described having extreme difficulty regulating his mood, with swings from one extreme to the other. He reported that he has had a 'death wish' for as long as he can remember; he noted that death would allow him to escape the nightmares related to the things that have happened to him; and he reported a history of suicide attempts that started when he was an adolescent. He reported that when he was still quite young he discovered that cutting himself helped calm him down; he described in great detail the calming effect of just seeing the blood; and he reported that then he continued to be a cutter.

A648.

206. Dr. Dudley addressed the interacting nature of Mr. Tabler's disorders. His difficult childhood, involving trauma and abandonment, led to longstanding interpersonal difficulties, cutting behavior, extreme mood reactivity, identity confusion, self-destructive behavior, and general impulsivity. A651-52. All these symptoms were superimposed on the syndromes he was born with. Several disorders caused him to experience clinically significant levels of anxiety. Several disorders impaired his ability to regulate his mood. Several disorders undermined his cognitive development, especially executive functions. Furthermore, his neurocognitive deficits and substance abuse made it more difficult for him to identify and address his other problems. The combined effect of his disorders was greater than their sum. A652-54.

> [F]rom birth Mr. Tabler suffered from FASD and Klinefelter Syndrome. Given the effects of those difficulties on the development of his brain and available information on his neurocognitive development during his childhood years, it is reasonable to say that he also suffered from intellectual and other cognitive deficits during his childhood years, possibly made worse by later additional insults to his brain. As a child he also suffered from psychological and physiological trauma-related difficulties. In addition, he suffered from a range of

> difficulties with psychological development resulting in the development of personality characteristics characterized by instability in multiple important areas of functioning, including attachment, his sense of self, and his mood, as well as impulsivity and self-destructive behaviors. Then in addition, Mr. Tabler's early self-medication with various substances quickly developed into substance abuse difficulties. Furthermore, he eventually also suffered from a Bipolar Disorder, with psychotic features.
>
> Given that Mr. Tabler has been previously described as suffering from Antisocial Personality Disorder, it should be noted here that the constellation of difficulties with psychological development and the resultant personality difficulties found by this psychiatrist are best described as Borderline Personality Disorder. This psychiatrist did not find that Mr. Tabler exhibited the characterological difficulties seen in persons suffering from Antisocial Personality Disorder. Furthermore, it is the opinion of this psychiatrist that any antisocial behavior that Mr. Tabler has exhibited is more appropriately attributed to/the direct result of the combination of his other, above noted psychiatric and neuropsychiatric difficulties.

A654. Dr. Dudley observed that, because some of Mr. Tabler's impairments went undiagnosed at trial, it was necessarily impossible for the trial experts to assess the combined effects of all of them. A654.

207. As discussed in detail below, none of the social history or expert opinion evidence set forth in this section was available to the jurors, the state court, or this Court in any of the previous litigation in this case. It was available to prior counsel, but they did not uncover it.

STANDARDS RELATING TO INEFFECTIVE ASSISTANCE OF COUNSEL

208. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a petitioner seeking to establish the ineffective assistance of trial counsel must show: (1) that counsel's performance was deficient because it fell below "an objective standard of reasonableness," *id.* at 688; and (2) that the deficient performance prejudiced the defense because there is a reasonable probability that, but for counsel's errors, the outcome would have been different at either the guilt-innocence or the penalty phase of trial. *See Hinton v. Alabama*, 571 U.S. ___, 134 S.Ct. 1081, 1089 (2014); *Strickland*, 466 U.S. at 695; *see also Sears v. Upton*, 561 U.S. 945 (2010); *Porter v. McCollum*, 558 U.S. 30, 32 (2010); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 538 (2002); *Williams v. Taylor*, 529 U.S. 362, 398 (2000). The question is not whether the jury would have credited the evidence developed in the post-conviction proceedings, but whether the nature and quality of that evidence would have created a reasonable probability of a different result at the guilt-innocence or penalty phase.

209. In assessing prejudice, a reviewing court considers the effects of more than one deficiency cumulatively:

> In *Strickland,* the Supreme Court explained that in order to show that counsel's deficient performance prejudiced the defendant, it must be shown that "counsel's *errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687 (emphasis added); *see also id.* at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (emphasis added)). This court has previously applied a cumulative Strickland prejudice analysis when confronted with a case in which there were multiple instances of deficient performance by counsel. *See, e.g., White,* 610 F.3d at 912[19] (holding, in the alternative, that "[t]he combined prejudicial effect of the post-arrest silence and the death of the unborn child inexorably leads us to conclude that White has shown that the state court's conclusion that there was no reasonable probability of a different outcome is objectively unreasonable"); *Richards,* 566 F.3d at 564[20] ("We will address each aspect of Davis's

[19] *White v. Thaler*, 610 F.3d 890 (5th Cir. 2010).
[20] *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009).

> performance the district court found deficient before considering whether Richards was cumulatively prejudiced thereby."); *Moore v. Johnson,* 194 F.3d 586, 619 (5th Cir. 1999) (stating in a pre-AEDPA case that "we are unable to state that ... the cumulative effect of all deficiencies at the guilt phase[ ] is sufficient to render the guilty verdict ... unreliable.).

Dodson v. Stephens, No. 14-10127, 2015 WL 1948188, at *10 (5th Cir. May 1, 2015) (footnote omitted) (assuming that cumulative prejudice analysis is required).

210. In assessing prejudice caused by trial counsel's performance at the penalty phase of a capital case, a reviewing court must decide if there is a reasonable probability that, but for counsel's deficient performance, at least one juror would have voted for life. *See Wiggins*, 539 U.S. at 537. As the Fifth Circuit has explained:

> In conducting the *Strickland* prejudice analysis in this context, the Court has explained that we must consider both the "newly uncovered evidence" presented to the state habeas court, "along with mitigating evidence introduced during [the petitioner's] penalty phase trial, to assess whether there is a reasonable probability that [the petitioner] would have received a different sentence after a constitutionally sufficient mitigation investigation." *Sears v. Upton,* 561 U.S. 945, 956, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010). After "compar[ing] the evidence actually presented at sentencing with any additional mitigating evidence presented in the habeas proceeding[,]" we inquire as to "whether under the applicable state capital sentencing statute, the additional mitigating evidence [is] so compelling that there [is] a reasonable probability that at least one juror could have determined that because of the defendant's reduced culpability, death [is] not an appropriate sentence." *Ruiz v. Stephens,* 728 F.3d 416, 424 (5th Cir.2013) (internal quotation marks and footnote omitted). In so doing, we consider all evidence presented to the state habeas court, without limiting our analysis to evidence that would have been admitted under Texas evidentiary rules. *Id.* at 424–25.

Escamilla v. Stephens, 602 Fed. App'x 939, 941-42 (5th Cir. 2015)(footnote omitted).

211. A reviewing court also assesses a claim that appellate counsel was ineffective under the *Strickland* standard. *Smith v. Robbins*, 528 U.S. 269, 285 (2000); *Dorsey v. Stephens*, 720 F.3d 309 (5th Cir. 2013). Appellate counsel is deficient if counsel failed to raise an obvious and potentially successful issue, stronger than those that counsel did present. *Dorsey*, 720 F.3d at 320. Particularly in a capital case, appellate counsel can have no

reasonable strategy to justify failing to raise a meritorious issue. *See Greer v. Mitchell*, 264 F.3d 663, 679 (6th Cir. 2001) ("[I]n a capital case . . . appellate attorneys must err on the side of inclusion particularly where, as here, there appear to exist a significant number of facts to support the claim.").

212. A habeas petitioner challenging appellate counsel's representation establishes prejudice by showing that, but for counsel's error, there was a reasonable probability that the outcome of the appeal would have been different. *Dorsey*, 720 F.3d at 321. Thus, where appellate counsel fails to raise a meritorious claim on appeal, counsel is constitutionally ineffective. *Mason v. Hanks*, 97 F.3d 887, 892-93 (7th Cir. 1996) (appellate counsel ineffective for failing to raise claim relating to erroneous admission of hearsay evidence); *Mayo v. Henderson*, 13 F.3d 528, 533-34 (2d Cir. 1994) (appellate counsel ineffective for failing to raise issue relating to state discovery rule); *Matire v. Wainwright*, 811 F.2d 1430, 1435, 1439 (11th Cir. 1987) (appellate counsel ineffective for failing to raise claim relating to comment on defendant's post-arrest silence).

PROCEDURAL DEFAULT

213. In its previous decision, this Court denied all but four claims as procedurally defaulted. The Fifth Circuit vacated that decision and remanded to this Court for consideration of the procedural default issue. Petitioner can overcome the alleged default and is entitled to merits review of his ineffectiveness claims for two reasons. First, Petitioner's claims of ineffectiveness were defaulted only because of his state habeas counsel's ineffective assistance in his initial collateral review proceeding, excusing the default. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Second, the procedural bar imposed by the Texas courts—denying Petitioner the ability to file a state habeas application on the basis of his alleged waiver—was not firmly established and regularly followed and therefore was inadequate to bar federal habeas review.

I. STATE HABEAS COUNSEL'S ABANDONMENT OF MR. TABLER AND INEFFECTIVE ASSISTANCE IN POST-CONVICTION PROCEEDINGS PROVIDE CAUSE AND PREJUDICE FOR THE STATE COURT DEFAULT.

214. State habeas counsel failed their seriously mentally ill client in three ways. First, despite glaring signs of serious mental illness, unstable decision-making, and suicidal behavior, state habeas counsel failed to investigate Mr. Tabler's competency and voluntariness in waiving his habeas proceedings, and then abandoned their role as counsel at the September 30, 2008 hearing, refusing to challenge his competency and the voluntariness of the waiver. Second, because Texas law states that waiver is only truly accomplished on the date Petitioner's application is due, Petitioner was required to know the deadline in order to make a knowing decision whether to waive. Yet state habeas counsel failed to advise their client of this prerequisite for his waiver decision under Texas state law. Third, state habeas counsel failed in their obligation to investigate and develop Petitioner's claims, both before and after the September 30 hearing. State habeas counsel never obtained trial counsel's files or any

other records, abandoned investigation prematurely, and ignored their state-law duty to continue investigating even after their client expressed a desire to waive. Counsel's abandonment after the hearing again ensured Petitioner's default. To the extent this Court determines that there are controverted issues of material fact about these matters the Court should hold an evidentiary hearing.

A. The law of procedural default

215. The doctrine of procedural default is judge-made law designed "to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012). The doctrine imposes a bar on federal review of claims that "a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Id.* This bar does not apply, however, if certain prerequisites are not satisfied. The bar may be applied only if "the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed." *Id.* (citations omitted). Finally, a state prisoner may overcome this default in federal court by showing "cause" for the default and "prejudice" from the violation of federal law, among other ways. *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

216. The Supreme Court ruled that post-conviction counsel's ineffective assistance can constitute "cause" to overcome a default. In *Martinez*, the Court held that when an initial-review collateral proceeding is the first time a petitioner can raise a claim for ineffective assistance of trial counsel, state habeas counsel's ineffective assistance at that stage could supply "cause" for the default of the trial ineffectiveness claim. 132 S. Ct. at 1320. The next Term, the Court clarified that this rule applied to Texas, because the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that

a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013).

217. To establish cause for the default, the Fifth Circuit has held that *Martinez* requires Petitioner to show that (1) state habeas counsel's performance at an initial collateral-review proceeding was deficient as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) an ineffective-assistance-of-trial-counsel claim that state habeas counsel failed to raise has "some merit." *Canales v. Stephens*, 765 F.3d 551, 567-68 (5th Cir. 2014). Petitioner makes these showings in Parts I.C-G. In addition, Petitioner must demonstrate prejudice, which "requires a showing that there is 'a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 568 (quoting *Strickland,* 466 U.S. at 694) (alteration in original). The meritorious claims of trial ineffectiveness outlined in this pleading prove the actual prejudice.

218. The same Term, the Supreme Court carved out another exception to the general rule that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.'" *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (citing *Coleman*, 501 U.S. at 753). In *Maples*, the Court held that an attorney's abandonment of her client without notice in post-conviction proceedings could provide cause for the resulting default. *Id. Maples* reasoned that such actions by counsel could not be imputed to her client because the principal-agent relationship had been "severed." *Id.* at 922-23 (citing *Jamison v. Lockhart,* 975 F.2d 1377, 1380 (8th Cir. 1992) (attorney conduct may provide cause to excuse a state procedural default where, as a result of a conflict of interest, the attorney "ceased to be [petitioner's] agent")). Petitioner shows in Part I.E, *infra*, that counsel abandoned their client after (if not before) the

September 30, 2008 hearing and severed the principal-agent relationship, establishing "cause" under *Maples*.

B. Standards for waiver of state habeas proceedings

219. Article 11.071 of the Texas Code of Criminal Procedure does not explicitly give an applicant the ability to waive his right to file a state habeas application. The CCA has interpreted the statute as permitting waivers, however. The CCA has approved waivers where an applicant has been found competent and "knowingly," "intelligently," and "voluntarily" chose to waive the filing of a habeas application. *Ex parte Reynoso* (*Reynoso II*), 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008) ("knowingly and voluntarily"), *overruling Ex parte Reynoso* (*Reynoso I*), 228 S.W.3d 163 (Tex. Crim. App. 2007); *Ex parte Reedy*, 282 S.W.3d 492 (Tex. Crim. App. 2009) (requiring that applicant "knowingly, intelligently, and voluntarily" waive non-capital habeas proceedings); *Ex parte Martinez*, No. WR-61,844-01, 2005 WL 914216 (Tex. Crim. App. 2005) (dismissing writ under Article 11.071 based on competency determination); *Ex parte Hall*, No. WR-70,834-01, 2009 WL 1617087 (Tex.Crim.App. 2009) (same).

220. These two inquiries—competence, on the one hand, and knowing, intelligent, and voluntary waiver, on the other—reflect standards applied in federal cases under analogous circumstances. *See Godinez v. Moran*, 509 U.S. 389, 400 (1993) ("In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary."). To waive a federal habeas proceeding, courts ask whether a petitioner has the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S. 312, 314

(1966). The Fifth Circuit has distilled this rule into a three-part test. *See Rumbaugh v. Procunier*, 753 F.2d 395, 396 (5th Cir.1985); *Mata v. Johnson*, 210 F.3d 324, 328 (5th Cir. 2000). "This test requires the answer to three questions":

> (1) Is the person suffering from a mental disease or defect?
>
> (2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?
>
> (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?

Rumbaugh, 753 F.2d at 398. The "rational choice" inquiry incorporates the rule that a valid waiver must be made voluntarily. *See Mata*, 210 F.3d at 329 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brady v. United States*, 397 U.S. 742, 748 (1970)). As the Eighth Circuit concluded in applying the same *Rees* test, "Logic employed in the service of irrational premises does not produce a rational decision. . . . [I]t is not sufficient simply to determine whether a waiver decision has been arrived at logically." *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987).

221. Although an applicant must satisfy the aforementioned requirements to make a valid waiver, a waiver is not valid until "the filing date applicable to the applicant." Tex. Code Crim. Proc. art. 11.071 § 4(e). As the CCA has noted, "Because an applicant can waffle in his decision until the day the application is due, a 'waiver' is not truly effective until after that date has passed." *Reynoso II*, 257 S.W.3d at 720 n.2.

C. State habeas counsel ineffectively failed to investigate or challenge Mr. Tabler's competency & voluntariness to waive.

222. State habeas counsel had a duty to challenge Petitioner's decision to waive. *See* Part I.C.2 *infra*. "It is a dereliction of habeas corpus counsel's duty to simply acquiesce to a

capital client's insistence that he or she wishes to be executed." Texas Bar Association, *Guidelines and Standards for Texas Capital Counsel* 12.2(B)(2)(c) (2006). Had counsel properly provided information to the court and challenged his client's ability to make an intelligent and voluntary waiver, Tabler would not have been permitted to waive. Tabler's counsel could have raised the substantial trial ineffectiveness claims alleged in this petition and those claims had a reasonable probability of success on the merits.

1. State Habeas Counsel Knew About Their Client's Pronounced Mental Illnesses, Delusions And/Or Real Complaints Of Persecution, And History Of Vacillating On Waiver Prior To The September 30, 2008 Hearing.

a. Mental illness

223. Counsel knew about Petitioner's serious mental illness, which prevented him from making a rational choice about his decision to waive his habeas proceedings. State habeas counsel were acutely aware of Petitioner's "way delusional," "bizarre," and "very depressed" behavior, because those are the very words they used to describe their client at various points.

224. First, state habeas counsel obtained attorney Russ Hunt's file, compiled in preparation for Petitioner's trial. That file already contained many red flags for serious mental illness that could impair Petitioner's ability to make a rational decision to waive. For example, a review of the Hunt file would have disclosed to state habeas counsel that their client had a history of blackouts, traumatic brain injury, and mental illness. *See, e.g.*, A107, 108. In addition, on August 15, 2007, Mr. Tabler provided state habeas counsel, Mr. Schulman, information about his own history of mental illness as background for mitigation investigation: Mr. Tabler explained that, while in county jail before trial, he attempted to take his own life, was hospitalized at Scott & White Hospital, and the state wanted to send him to a mental

hospital. In a frank assessment, Tabler wrote, "I honestly feel that I need seriuos [sic] medical help with my problems as you may see I do have a problem with mental illnesses as well as (Frontal Lobe Brain Damage). . . ." A210. Mr. Tabler elaborated on this history in his first in-depth interview with Alma Lagarda of the Texas Defender Service. Lagarda's December 18, 2007 preliminary report described Mr. Tabler's "history of self-mutilation and suicidal tendencies" and details of medical treatment he received, including diagnoses of ADHD and bipolar disorder. A240. The report also reiterated the Hunt file's description of head trauma suffered in late adolescence. A239. Despite these reports of serious mental illness, head trauma, and suicidality, state habeas counsel never obtained a single record to substantiate this history.[21]

225. Moreover, state habeas counsel's own statements reveal their awareness of their client's mental health problems. On January 9, 2008, Mr. Schulman shared a letter Mr. Tabler had written with appellate counsel Karyl Krug. Mr. Schulman invited Ms. Krug to "let me know what you think," and offered his own opinion: "I think he's way delusional." A226. On April 12, 2008, following letters from Mr. Tabler stating within the course of a week that he wanted to waive (March 31, 2008) and that he wanted to continue his habeas process (April 5, 2008), Mr. Schulman wrote to his state habeas mitigation specialist Beth Larsen that "He appears to run quite hot and cold - he must have a very depressed side." A286. Following an April 25, 2008 client letter asking for emergency help because he feared for his life, Mr. Schulman wrote attorney Phil Wischkaemper that "I believe that he has of late been behaving in a fairly bizarre (non-violent) manner" and asking her for advice on psychologists or

[21] These early signs of serious mental illness were only a small portion of the records that competent counsel would have amassed. State habeas counsel failed to obtain the rest of the trial team's files, failed to request any records, and failed to conduct any interviews. As discussed below, this is another reason state habeas counsel's representation was ineffective.

psychiatrists who might examine Mr. Tabler. A288. In response to the same distressing letter, Beth Larsen told Mr. Schulman on May 2, 2008 that she believed Mr. Tabler "has always been delusional to some degree." A933. Larsen further speculated that "isolation may be putting a fair degree of pressure on that system" and that Mr. Tabler might be becoming "increasingly paranoid." *Id.* On May 5, 2008, in a brief memo to the file, Mr. Schulman stated that Mr. Tabler "is in some sort of distress but are uncertain whether this is a long standing problem or a result of confinement at death row (him becoming more paranoid)." A289.

226. Most importantly, state habeas counsel had Dr. Kit Harrison conduct a detailed neuropsychological evaluation of his client on June 27, 2008. Dr. Harrison produced an 18-page report and delivered that report to Mr. Schulman on September 8, 2008. Dr. Harrison's "mental status examination" cast significant doubt on Petitioner's capacity to waive intelligently and voluntarily:

> Although being oriented in all spheres, he demonstrates ***a rapid-cycling mood destabilization*** with strong evidence of Bipolar Disorder, Type I. He demonstrates full-blown manic and euphoric ideation which is evident during interview, coupled with obvious rapid-cycling depression, suicidality, intermittent explosiveness, and surging anger with a moment's notice. Thus, he is currently thought to be a danger to himself and others. . . . Although there is a clearly manipulative and attention-seeking element to Mr. Tabler's overt statements of homicidality, he does describe ***compulsive desires to injure himself*** and others. This is thought to be, in part, due to a ***highly paranoid and delusional worldview of chronic duration***. He gets so expansive, euphoric, and grandiose with drugs, or without drug intoxication, that he ***loses touch with reality***. It is noted he is currently off antipsychotic medication.... He is ***mildly psychotic***.

A491. State habeas counsel did not produce this report at Mr. Tabler's waiver hearings in state and federal court, instead providing the state court with only a two-page letter from Dr. Harrison.

227. Members of the defense team—including Mr. Schulman—knew that the larger report could influence a judge's decision whether Petitioner was making an intelligent and voluntary waiver. When Mr. Schulman distributed the report to members of his defense team

on September 10, his co-counsel John Jasuta replied that the report's conclusions "bring[] up an 'interesting' question: Can one who is in this type of mental state/condition truly waive anything of right, especially of this level of importance given the specificity evidenced in the excerpt of the report you sent?" A324. Nevertheless, state habeas counsel never presented this report to the court during the special hearing on Mr. Tabler's expressed desire to waive, held on September 30.

228. Yet it is clear from their later conduct that state habeas counsel found Dr. Harrison's report significant. In federal court, when Petitioner again sought to waive his legal rights—this time his right to file a federal habeas corpus petition— David Schulman and John Jasuta (now acting as federal habeas counsel) abruptly changed their position. In the June 2010 Unified Statement of Counsel and then at the August 17, 2011 hearing on Petitioner's desire to waive his federal habeas proceedings, Schulman and Jasuta strenuously objected to their client's capacity to waive based on information they already had in 2008. In the Unified Statement, Mr. Schulman lifted whole passages from Dr. Harrison's September 2008 report in support of the argument that Mr. Tabler "at this time is not competent and able to make a knowing, voluntary and intelligent waiver of his rights to appeal." A382.

229. Furthermore, before this Court, Mr. Schulman vacillated over whether to introduce Dr. Harrison's report, which he admitted was "relevant to [the Court's] decision." Fed Hr'g, at 16, 18, ECF No. 35. Mr. Schulman recognized his "duty to [the court] as much as . . . a duty to" Mr. Tabler. *Id.* at 16. This Court told Mr. Schulman that it "would like to have that information" and provided a recess so that Mr. Schulman could present the report to opposing counsel, Dr. Saunders, and the court. Indeed, opposing counsel agreed that court-appointed competency expert Dr. Saunders should be given the chance to review the report and

"perhaps ask him if this changes his opinion." *Id.* at 17-18. Inexplicably, however, the report was not produced at the federal hearing either. *Id.* at 20.

b. Threats real or imagined

230. Another important piece of information available to Mr. Tabler's state habeas lawyers was his apparently delusional persecutory beliefs. Just as state habeas counsel (then acting as federal habeas counsel) showed this Court, Mr. Tabler was unable to make a voluntary decision to waive during state habeas proceedings because he was threatened or suffered from delusions of threats. Mr. Tabler mentioned substantial threats *long before* he was arrested for illegal cell phone use in October 2008 (which occurred just a few weeks after the waiver hearing in state court). On December 25, 2007, for example, Mr. Tabler wrote that he was in "'FEAR' for my life!" on account of threats "by Major Smith, Captain Laycox and Lt. Duff." A217. Tabler described denials of mail, meals, privileges, and concluded by stating that "I feel that their [sic] doing this 'cause I refuse to help them as a snitch about some cell phones." *Id.* On April 25, 2008, Mr. Tabler mentioned these fears again. A287. Mr. Tabler also persistently complained about prison officials meddling with his mail. *See, e.g.*, A278 (March 20, 2008) (mail not going to mother); A309 (July 28, 2008) (not allowed phone calls to mother and sister; very slow to receive mail).

c. Vacillation on decision to waive

231. Relatedly, by the time of the state habeas waiver hearing September 30, 2008, state habeas counsel well knew that their client had frequently flip-flopped on his decision to waive. As laid out in the statement of facts above, Mr. Tabler had decided to waive and quickly capitulated multiple times: on July 9, 2007, waive, on July 26, resume; on March 31, 2008, waive, on April 5, resume; on June 2, 2008, waive, on June 27, continue; on July 2, 2008, waive, on July 28, resume.

232. Nevertheless, state habeas counsel stood mute at the September 30 waiver hearing instead of informing the court of the instability of their client's wishes. Yet they later advanced Mr. Tabler's vacillating decision-making as the basis to reinstate Mr. Tabler's state habeas proceedings when, a few months after "waiving," he changed his mind again. Mr. Schulman and Mr. Jasuta argued that the Court of Criminal Appeals should find "good cause" for untimely filing of the habeas application because of Mr. Tabler's "on again – off again" desires to waive. Yet even then, they failed to provide any documentation of their client's alternating decisions and in their brief description of events, state habeas counsel skewed the account severely.[22]

2. Given what state habeas counsel knew or should have known, they had an obligation to contest their client's waiver.

233. Counsel has an obligation not to acquiesce uncritically in a client's desire to be found competent or to waive rights. Counsel must usually obey a client's directives. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.02(a)(1). That is not the case, however, when a client seeks to waive his rights and counsel suspects his client to be incapable of waiving. Courts have consistently recognized that counsel must perform adversarial testing of a competency determination in order for the court to make a reliable and accurate judgment.

234. In *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990), the Fifth Circuit held that counsel was ineffective where he failed to raise challenges to his client's mental status. Although aware of his client's history of mental problems and institutionalizations, counsel nonetheless undertook no investigation "because he said that Bouchillon appeared rational."

[22] Counsel indicated Mr. Tabler made a definitive decision to waive on May 15, 2008. In fact, their client had only stated that he was "seriously not to[o] sure that I wanna go forward with my appeals after my direct appeal" and stated that he "***may*** decide to drop my appeals and be a volunteer for execution." A291. State habeas counsel's misrepresentation of events conveniently dovetailed with counsel's decision to stop investigating the case in May 2008. *See* Part I.E (abandonment).

Id. at 596. Central to the court's reasoning was the fact that "the trial court . . . relies on counsel to bring these matters to his or her attention.... If counsel fails here to alert the court to the defendant's mental status the fault is unlikely to be made up." *Id.*

235. This echoes the position of other circuits. "[W]e think it axiomatic that the desire of a defendant whose mental faculties are in doubt to be found competent does not absolve counsel of his or her professional responsibility to put the government to its proof at a competency hearing when the case for competency is in serious question." *Hull v. Freeman*, 932 F.2d 159, 169 (3d Cir. 1991), *overruled on other grounds as stated in Caswell v. Ryan*, 953 F.2d 853, 859 (3d Cir. 1992); *see also United States v. Boigegrain*, 155 F.3d 1181, 1188 (10th Cir. 1998) ("[D]efendant's lawyer is not only allowed to raise the competency issue, but . . . she has a professional duty to do so when appropriate."); *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994) ("[C]ounsel has a duty to investigate a client's competency to stand trial or plead guilty. An attorney cannot blindly follow a client's demand that his competency not be challenged.").

236. When counsel abandon their role as advocates for their client's interests, they are as good as no counsel at all. *Appel v. Horn*, 250 F.3d 203, 215 (3d Cir. 2001) ("[The attorneys] had the obligation to act as counsel at Appel's competency hearing by subjecting the state's evidence of competency to meaningful adversarial testing."). This is especially so because competency hearings are crucial stages at which counsel need to be present. *See, e.g.*, *Raymond v. Weber*, 552 F.3d 680, 684 (8th Cir. 2009) (agreeing with all other circuits to consider the question that competency hearing is critical stage of criminal prosecution); *Appel,* 250 F.3d at 215. Texas law also reflects this duty. In the analogous competency-to-stand-trial context, "[a] defendant is entitled to representation by counsel before any court-ordered

competency evaluation and during any proceeding at which it is suggested that the defendant may be incompetent to stand trial." Tex. Code Crim. Proc. art. 46B.006.

237. This also comports with the due process standards the Fifth Circuit has imposed on hearings for competency to waive federal habeas proceedings. There, the Fifth Circuit has recognized counsel's duty to ensure adversarial testing. In *Mata v. Johnson*, 210 F.3d 324 (5th Cir. 2000), the court held that an "opportunity for the parties to present testimony or documentary evidence" was a requisite part of an adequate competency process. *Id.* at 333. This presupposed the existence of two adversarial "*parties*"—one advocating for competency to waive, the other challenging it. When one party does not show up, the hearing fails to ensure a reliable result. *See O'Rourke v. Endell*, 153 F.3d 560, 569 (8th Cir. 1998) (finding waiver proceeding violated due process where no counsel argued against client's competence or voluntariness).

238. Finally, Texas ethical rules mandate that a counsel faced with the task of challenging their own incompetent client "***shall*** take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client." Tex. Disciplinary R. Prof'l Conduct 1.02(g). This provision protects against the ethical problems state habeas counsel faced. When a client of doubtful competence announces a decision that counsel believes may be the product of an unsound mind and may result in an outcome that does irreparable harm to the client's interests, the "lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests." Tex. Disciplinary R. Prof'l Conduct 1.02 cmt. 13; *In re McCann*, 422

S.W.3d 701, 708 (Tex. Crim. App. 2013) ("[A] client's ability to define his or her own best interests may end when an attorney's duty under Rule 1.02(g) . . . begins—when an attorney reasonably believes that the client's ability to make decisions in his or her best interest is compromised, the appointment of a guardian should be sought.").

239. Other courts have endorsed similar protective arrangements. *See Comer v. Stewart*, 230 F. Supp. 2d 1016, 1019 (D. Ariz. 2002) (instructing habeas counsel to continue investigating, and appointing new counsel to represent petitioner "concerning his expressed decisions to end his appeals and proceed to execution"); *see also O'Rourke*, 153 F.3d at 569 ("We believe [petitioner] should have been represented by an attorney, either a counsel of record or a 'next friend,' to argue that he lacked the capacity to waive his appeal."); *Mason v. Vasquez*, 5 F.3d 1220, 1222 (9th Cir. 1993); *State v. Ross*, 873 A.2d 131 (Conn. 2005).

3. Counsel performed unreasonably and abandoned Mr. Tabler at his critical waiver hearing.

240. Instead of performing as counsel, Mr. Schulman and Mr. Jasuta abdicated any role in the September 30, 2008 waiver hearing. Mr. Schulman announced that, while present for the proceeding, "we do not announce ready[] because we do not intend to take a position one way or the other of what should happen today." V.CR.357. This statement ensured that Mr. Tabler's best interests went unguarded while he was allowed to declare himself "competent enough." *Id.* at 365.

241. As a result, state habeas counsel failed to make legal arguments about the law governing waiver and its application in Mr. Tabler's case. State habeas counsel failed to inform the court of the new neuropsychological evaluation performed by Kit Harrison and the extensive description of their client's mental illness already available to them despite their limited investigation. State habeas counsel failed to inform the court about the numerous

delusional and/or genuine threats Mr. Tabler believed he had experienced. And state habeas counsel failed to inform the court regarding Mr. Tabler's's highly unstable pattern of deciding to waive but then insisting on resuming. Counsel was in effect absent at the hearing, rendering the result unreliable. *See Bouchillon*, 907 F.2d at 596; *Appel*, 250 F.3d at 215.

242. Indeed, state habeas counsel's only meaningful participation in the hearing was to provide the court with Dr. Kit Harrison's two-page "letter" evaluating competency (while withholding the eighteen-page report documenting Mr. Tabler's mental health impairments in detail). Because of state habeas counsel's insistence on abdicating any role, the letter was marked as a "Court Exhibit."[23]

243. Moreover, state habeas counsel ineffectively and unethically permitted the court to unofficially direct the defense. State habeas counsel acceded to the court's extraordinary, unrecorded demand that counsel use their potential neuropsychologist to conduct competency testing and disclose the results as a pre-condition for further funding of the defense. *See* A296 (June 11, 2008 e-mail from Schulman to Larsen). The terms of this order were shaped during a June 6, 2008 phone call between Judge Trudo and Mr. Schulman. During the "conversation," Mr. Schulman disclosed his client's confidential attorney-client communications to tell Judge Trudo about his "client's stated intent to end all appeals." *Id.* Mr. Schulman's breach of confidentiality was not only improper; it was factually incorrect. His client's last statement about pursuing state habeas was an equivocal "seriously not to[o] sure" coupled with the

[23] The two-page letter, dated July 28, 2008, was not included in the state-court record Respondent compiled from the CCA's records. Nor is it located in the Bell County state court file Petitioner received. On appeal, for purposes of the state court record, Mr. Tabler submitted a copy of the letter as RE 10 moved to supplement the record with this document. The letter does not reflect that Dr. Harrison had access to any records regarding Mr. Tabler's history of psychiatric illness and hospitalizations. Moreover, Dr. Harrison noted that during his examination of Mr. Tabler on June 27, 2008, Mr. Tabler "expressed a desire to continue the appeal process . . . ."

announcement that he was suspending his decision until "*after my direct appeal*." *See* A291. Counsel's inaccurate and unethical disclosure led Judge Trudo to commandeer Mr. Schulman's expert, transforming an ordinary request for funds into an irregular order for a competency evaluation. As a result, Mr. Schulman and the trial judge had a competency report *before* Mr. Tabler had indicated a true desire to waive. And Mr. Schulman also improperly abandoned any investigation after that point even though Texas law required that he not do so.

244. In any case, state habeas counsel failed to provide Dr. Harrison with any guiding legal framework or supporting mental health records for his evaluations. Instead, Dr. Harrison received Beth Larsen's initial report and a smattering of trial exhibits. Dr. Harrison's resulting two-page competency report suffered from these limitations, yet state habeas counsel failed to test Dr. Harrison's letter at the competency hearing.

245. The court itself acknowledged the competency letter lacked detail. V.CR.366. Indeed, the letter did not state what competency standard Dr. Harrison was applying. The letter did not explain what records had been reviewed. To the extent the letter identified a consulting question at all, it misidentified the proceedings: "whether the defendant is competent to make decisions concerning suspending his rights to ***automatic appeal*** of his capital murder conviction and resulting execution." While the letter identified a series of neuropsychological tests performed, it did not report any of the results or explain their significance.[24]

246. Even so, the letter also contained numerous statements that gave grounds to question the validity of Mr. Tabler's waiver. Dr. Harrison acknowledged that Mr. Tabler's "knowledge understandably weakens when it comes to all the legal possibilities which could

[24] As discussed in Claim II.B infra, the tests demonstrated impaired brain function in a number of key domains.

result in a possible suspension of the death sentence." He commented that "[i]t is not at all unusual to have death row inmates vacillate on such matters affecting their ultimate best interests, particularly in proportion to their perceived circumstances and fluctuating mental status while incarcerated." And the letter concluded by noting that, at the time of Dr. Harrison's interview on June 27, Mr. Tabler "expressed a desire to continue the appeal process." Each of these shortcomings could have been attacked by competent counsel acting in their client's interests. But state habeas counsel refused to speak up in their client's best interests.

4. Mr. Tabler did not make a voluntary and competent decision to waive his state habeas corpus rights.

247. As previously recounted, this Court ruled in August 2011 that Mr. Tabler's attempt to waive federal habeas proceedings was involuntary. The conditions that led the Court to that conclusion arose earlier, and manifested even before the September 30, 2008 hearing. *See* ECF No. 34 (sealed order). As a result of the state-law procedures described above, the delusions or credible threats that made the attempted waiver of federal habeas involuntary are equally important to this Court's assessment of the waiver of state habeas proceedings.

248. In addition, Mr. Tabler's state habeas proceedings had not properly concluded on September 30 and actually extended at least to November 17. Therefore, this Court should weigh both the conditions after the September 30 hearing, as well as the strikingly similar conditions Mr. Tabler states he was under preceding the hearing.

249. On August 17, 2011, this Court held a competency hearing to address Mr. Tabler's renewed efforts to waive his habeas rights. ECF No. 35. The Court appointed Dr. Richard D. Saunders to conduct a mental health evaluation. Although this Court found Mr.

Tabler competent to waive his rights, it concluded that his waiver was involuntary because of his belief that family members would be harmed if he did not waive his rights and proceed to execution, and other factors detailed in a sealed order. *See* ECF No. 34.

250. This Court's competency decision was hampered by the continuing conflict of interest Mr. Schulman and Mr. Jasuta labored under in failing to attack their own prior conduct. They were unable and unwilling to point to the wealth of information current counsel now presents as evidence of Mr. Tabler's incompetence in 2008. Dr. Saunders's competency determination—lacking Dr. Kit Harrison's 2008 evaluation or the thousands of pages of medical, institutional, and school records—cannot give a complete picture of Mr. Tabler's competency to waive in 2008.

251. But, just as this Court found in 2011 on the spare record conflicted counsel was willing to present, Mr. Tabler's decision-making in 2008 was involuntary, too. Mr. Tabler demonstrated persistent delusions leading up to the state waiver hearing. *See* A217, A287. This correspondence identified many of the same people, same topics, and same feelings of imminent danger as this court took cognizance of in its August 2011 order. As in 2011, Mr. Tabler's 2007 letter mentions threats and deprivation as a result of pressure to "snitch" about cell phones. As in 2011, certain corrections officials are mentioned. As in 2011, Mr. Tabler felt that he was under threat for his life. As in 2011, this undermined Mr. Tabler's ability to make a rational and voluntary choice.

252. After Mr. Tabler's October 21, 2008 arrest for using a contraband cell phone in prison, his decision-making was even more certainly involuntary. On February 19, 2009, Mr. Tabler sent Judge Trudo a letter informing her that officers at the Polunsky unit put him in fear for his life; he tried to kill himself and was transferred to Jester IV where he told the court he

would remain until March 11, 2009. Mr. Tabler told the court, "I'll be sent back to the Polunsky Unit's DR . . . where I know I'll be killed by the officers or I'll end up killing myself." A934.

253. Judge Trudo found Petitioner's claim sufficiently substantial and alarming to require a letter to John Moriarty, Inspector General; Tim Simmons, Warden, Polunsky Unit; and Tommie Haynes, Warden, Jester IV, asking them to "investigate Mr. Tabler's claims and ensure his safety pending appeal and further orders of the court." A365. Next week, on March 2, 2009, Mr. Tabler wrote Judge Trudo again, this time expressing a desire to pick up his habeas process and discussing in poignant detail his struggle with mental illness: "Some times I'm in good spirits, then for no reason I'll have flashbacks and want to cry, scream, and kill others along with myself ... Some days I see myself picking up my appeals thanks to an honest persons who's been getting in my head, but when he's not around to help me remember what I should fight for, I become more of an animal that wants nothing more then to see the fear in another's eyes before the kill." A966..

254. Petitioner even cast his decision to resume his habeas proceedings in terms of an involuntary decision. On June 9, 2009, Mr. Tabler wrote Judge Trudo to inform her that he had a "change of heart." But Mr. Tabler also indicated that he felt "pushed" into the decision by "problems with myself and the people of Polk County along with the staff here on Death Row," which he needed to urgently discuss with the court in person. A367.

255. This Court should conclude that, but for counsel's failure to challenge Petitioner's compentency and voluntariness, there is a reasonable probability that the court would have found Petitioner incapable of waiving. As Dr. Harrison's report laid out at length, in September 2008, Petitioner suffered from a "deep and severe constellation of mental

illnesses [that] have been disabling and debilitating for him since at least early adolescence and have never been adequately managed from a medical or psychological standpoint." A486. These mental illnesses satisfy the first question of the *Rumbaugh* test. Second, even if Petitioner's mental diseases and defects do not clearly deprive him of his ability to understand his legal position, they do "prevent him from making a rational choice among his options." *Rumbaugh*, 753 F.2d at 398; *Groseclose v. Dutton*, 594 F. Supp. 949, 958-62 (M.D. Tenn. 1984) (finding combination of metnal illness and harsh conditions of confinement rendered waiver involuntary); *In re Cockrum*, 867 F. Supp. 484, 493 (E.D. Tex. 1994) (finding petitioner incapable of waiving under the *Rees* test where "the applicant's own letters to this court indicate a suicidal mentality that relates back to his relationship with his father, rather than to the crime for which he was sentenced to die" and therefore "must be rejected as a rational basis for waiver of legal review").

256. In sum, Mr. Tabler's choices—both to waive and to resume—were subject to the delusions and fears gripping his mind from at least December 2007 to July 2009 and which this court recognized in its August 2011 order and again in March 2015. Moreover, because of prior counsel's ineffective performance, this Court was not even aware of the profound genetic and mental conditions presented in this pleading.

D. State Habeas Counsel Failed To Advise Petitioner About His Deadline To File And Failed To Understand And Advise Petitioner That His Waiver Was Only Effective On The Deadline To File, Thereby Preventing Petitioner From Making A Knowing Decision About Whether To File And Allowing Petitioner To Make A Premature And Invalid Waiver.

257. Under the Texas capital habeas statute, waiver of the filing of a habeas application is only effective when the deadline to file passes. *Reynoso II*, 257 S.W.3d at 720

n.2. This rule enables waffling applicants to make a decision to file before it is too late. *Id.* In order to make a knowing waiver, then, an applicant must know his or her deadline to file.

258. But Tabler never knew when his state habeas application was due. He believed (as he was told by direct appeal counsel, state habeas counsel, and the court) that his habeas application could be filed after his direct appeal concluded. This led Mr. Tabler to the misunderstanding that his state habeas application was not due until some distant point in the future, and that he had until that distant time to waive. In fact, based on Mr. Tabler's understanding of the deadline, his decision to "pick up" his habeas proceedings was timely.

259. In fact, the deadline to file was November 17, 2008. That date could not be known with certainty at the time of the hearing, however, because the triggering condition for the deadline had not yet occurred. No record reflects that Mr. Tabler was ever told the correct deadline. The actions of state habeas counsel and the court indicate that they did not believe the November 17, 2008 date was operative. Because he believed could continue to change his mind until after his appeal was denied by the Court of Criminal Appeals, and because the alleged "waiver" hearing conducted on September 30, 2008, was premature, he could not make a knowing and effective waiver.

260. State habeas counsel did not inform Mr. Tabler of his deadline to file or correct the court's inaccurate statements about that deadline, resulting in Mr. Tabler's fundamental misunderstanding about the habeas process. State habeas counsel's misunderstanding of a basic point of state law and failure to advise their client competently is unreasonable. *See Canales*, 765 F.3d 567-68; *cf. Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) ("We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.").

1. Counsel Misled Their Client About His Time To File His Application And Failed To Apprise Petitioner Of His Time To File His Application.

261. Mr. Tabler believed he could file his state habeas petition at any time until his direct appeal was over. That is what his counsel told him he could do, and it is what he often repeated in his statements of future intent to waive. Following his first attempt to waive in July 2007, Mr. Schulman wrote his client matter-of-factly: "The reality is you will be with us ***until your direct appeal is over***." A208. The idea that he could only waive after his direct appeal became Petitioner's constant refrain in communications about his desire to waive. On April 1, 2008, Mr. Tabler wrote the court: "***Should that appeal be denied***, I'm asking that no other appeals be turned in on my behalf. . . . Now I ask that the courts accept and grant my letter of withdrawal of all my appeals ***after my direct appeal***" A281.[25]

262. This created confusion for Mr. Tabler, particularly in light of his severe mental illness. Mr. Tabler was relying on the fact that he could change his mind at any time up to and after the direct appeal concluded. In his only recorded letter addressed to the trial court on waiver, Mr. Tabler believed that he did not have to file his habeas application until after his conviction was affirmed: "Should that appeal be denied, I'm asking that no other appeals *be turned in* on my behalf." Importantly, Mr. Tabler did not ask that his habeas application *be withdrawn* after his direct appeal, which would be the case if Mr. Tabler believed the deadline to file a habeas application came before the direct appeal concluded.

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[25] *See also* A292 (May 15, 2008: "Seriously not too sure I want to go forward with my appeals ***after my direct appeal***. ***After my direct appeal***, I may decide to drop my appeals and be a volunteer for execution."); A294 (June 3, 2008: instructing Schulman to tell the court that "you don't plan on filing anything on my behalf ***after my direct appeal***"); A305 (July 17, 2008: Schulman asking Mr. Tabler "to hold off on dropping your habeas proceeding ***until we've seen what happens on your direct appeal***").

263. The court's misstatements of law reinforced this faulty conclusion and only deepened the confusion about Mr. Tabler's true deadline to file. At the hearing, the court first misstated the relationship of Texas capital habeas and direct review:

> THE COURT: Under the laws of the State of Texas, if your direct appeal is affirmed you may proceed with your appeal by filing a petition for writ of habeas corpus in state court in order to appeal the validity of your conviction for capital murder.
>
> . . . . Do you understand that?

V.CR.359.

264. In fact, filing a state habeas application is ***not*** tied to the disposition of the direct appeal. Texas's capital habeas and direct appeal proceedings commence concurrently. An application for habeas corpus under Article 11.071 must be filed within a deadline set by the later of two triggers. Those triggers are early-stage events in the direct appeal process—180 days from the date that the reporter's record is compiled or 45 days from the date the state files its brief as appellee in the direct appeal. Therefore, while it is conceivable that a defendant's conviction could be affirmed on appeal before he files his habeas application, a defendant often will be required to file a state habeas application before the conviction is affirmed on appeal.

265. This faulty premise infected the court's colloquy with Mr. Tabler. The court asked Mr. Tabler, "***If your direct appeal is affirmed***, do you wish to go forward with the state habeas appeal by filing a state petition for writ of habeas corpus?" V.CR.359. And again the court asked, "Knowing all this, ***if your direct appeal is affirmed***, do you want to go forward with the state habeas appeal?" *Id.* at 360. And again, **"**So are you saying at this time that you don't want to continue your appeals ***after your direct appeal has concluded***?**"** *Id.* at 361. Mr. Tabler agreed that he wanted to waive "my appeals ***after my direct appeal***." *Id.* at 362.

2. Counsel Never Told Petitioner His Deadline To File.

266. Following its colloquy, the court turned to the topic of "the appellate process and the time frame." *Id.* at 364. The court told Mr. Tabler that it had met with Mr. Tabler's attorneys to discuss the issue. *Id.* The court asked Mr. Tabler if he "understood what kind of time frame they're under." *Id.* Mr. Tabler agreed, but the record does not reflect that Mr. Tabler knew when his application would be due or how the date was calculated. The court did not confirm in open court whether Petitioner had in fact received correct information regarding the due date. Nor did the court explain to Mr. Tabler that, under the law, he could not waive until the filing date and that he could change his mind up until the filng date. Indeed, the court treated the provisional waiver as valid as of September 30, the day of the hearing. Current counsel's review of state habeas counsel's file reveals no record of counsel conveying the correct date to Mr. Tabler.

267. Indeed, state habeas counsel could not know with certainty when the application would be due. The relevant trigger in this case was the filing of the state's appeal brief. But, at the time of the hearing, that event had not yet occurred. The state's appeal brief was due October 6, 2008. The state could have sought a further extension of the time to file. In fact, the state filed the day after the hearing, October 1. Counting forty-five days from that date, Mr. Tabler's petition was due on November 17.

268. No post-hearing communication took place to cure this failure to inform the client. Mr. Schulman's records show that he did not contact his client at all from September 30, 2008, until July 16, 2009. For a significant portion of the critical period between the hearing and the deadline, counsel was crucially absent and unavailable to advise his client. In a December 29, 2008 letter to Judge Trudo, Mr. Tabler stated that he had "had no contact with any attorneys" following the September 30, 2008 hearing.

269. Moreover, the court's subsequent actions suggest that it did not apply the appropriate "time frame" for the habeas proceedings. The court took no action on the putative deadline, November 17 (45 days after October 1). By statute, the convicting court is required to inform the CCA within 10 days of the application deadline whether a writ has been filed. Tex. Code Crim. Proc. art. 11.071 § 4(d).[26] Yet the trial court never provided this notice. This inaction indicates that the court did not recognize that the deadline had passed. The first on-the-record statement regarding Petitioner's deadline to file occurred on July 27, 2009, more than a month after Petitioner had asked to reinstate his habeas proceedings and only at the prompting of the CCA. A935. Only then did the court announce, in a letter to the CCA—copying David Schulman—that "No application was timely filed with the trial court by Nov. 17, 2008." *Id.* This letter identified for the first time in the state habeas record Petitioner's due date.

270. As a result, Mr. Tabler made his decision whether to "waive" on September 30, 2008, under the misimpression that he could change his mind until the CCA ruled on his direct appeal case. Indeed, Mr. Tabler did change his mind and attempted to "reinstate his appeals" long before the CCA had ruled on his direct appeal, only to be rebuffed by the CCA because his change of heart was out of time. A367.

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[26] Section 4(d) provides:

If the convicting court . . . determines that after the filing [deadline] no application has been filed, the convicting court *immediately, but in any event within 10 days*, shall send to the court of criminal appeals and to the attorney representing the state:

. . . a statement of the convicting court that no application has been filed within the time periods required . . . and

Any order the judge of the convicting court determines should be attached . . . .

271. The U.S. Supreme Court has held that "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point [is] a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014). The Fifth Circuit agrees and has applied *Hinton* to hold a state habeas counsel's mistake of law deficient. In *Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014), the Fifth Circuit found "cause" for a procedural default where Canales's state habeas counsel chose not to pursue an investigation into trial counsel's ineffectiveness in investigating mitigation based on a "mistaken belief" that he could not receive any funding to pursue those claims. *Id.* at 569 (quoting *Hinton*, 134 S. Ct. at 1088-89). Just like *Hinton* and *Canales*, state habeas counsel remained ignorant of a crucially important issue in Petitioner's case—whether waiver was effective at any time prior to the deadline to file or only upon the passage of the deadline.

272. Counsel also failed to advise the client of this rule or his time to file. This failure was likewise deficient under the *Strickland* standard. As discussed below, but for this failure, there is a reasonable likelihood that Petitioner would not have waived. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

E. State Habeas Counsel's Abandonment Of His Client Prior To The Deadline To File Was Premised On Serious Mistakes Of Law.

273. State habeas counsel broke all contact with their client and released themselves from responsibility following the purported competency finding. But state habeas counsel's abdication of their duties began in May 2008. After counsel agreed to provide a competency

evaluation as a condition for any further investigative funding in early June, state habeas counsel ceased to perform their principal task—expeditiously investigating and developing Mr. Tabler's potential state habeas claims—without informing Mr. Tabler. Certainly following the hearing state habeas counsel ceased communication and made no further investigation.

274. Yet state habeas counsel has an ongoing duty to investigate and develop their client's habeas claims even after he has expressed an intent to waive and been found competent to waive. 11.071 § 3(a). That is because an applicant may still change his mind at any time up until the deadline to file. As a result, the CCA has held that, faced with a client seeking to waive, counsel must "either (1) move to withdraw from the case, or (2) diligently pursue the investigation despite his client's protests." *Reynoso II*, 257 S.W.3d at 720 n.2. This ignorance of state law requiring continuing representation was unreasonable. *Hinton*, 134 S. Ct. at 1089; *Canales*, 765 F.3d at 569 ("mistaken belief" regarding state law provided "cause" to overcome default).

275. In addition, counsel's abandonment severed the attorney-client relationship such that counsel's failure to investigate or file a timely application should not be imputed to the client and should be treated as an external factor to the petitioner, sufficient to show "cause" under *Maples*. *See Maples*, 132 S. Ct. at 922-23.

276. Likewise, state habeas counsel should have known that the court's unwritten deal—denial of funding until it received defense expert's competency report—conflicted with the Article 11.071 statutory duties of counsel. Since waiver could only be achieved when the deadline to file passes and counsel must continue investigating until the waiver, counsel for a client who wishes to waive would continue to need to investigation funding up to the deadline just like any other applicant's counsel.

277. State habeas counsel believed that waiver was effective as of the date of the hearing or the date the order "granting" Mr. Tabler's "request to waive his rights under 11.071 and to dispense with his habeas corpus action." As a result, state habeas counsel believed they were "released" of their duties before the actual deadline to file. State habeas counsel submitted this proposed order at his earliest convenience after returning from vacation and well in advance of Petitioner's actual November 17 deadline to file. The court signed the order on November 5, twelve days before Petitioner's application was due.

278. Both state habeas counsel and the court should have known that counsel were required to remain on the case pursuant to their statutory duty to investigate. In his communications with counsel in the spring and summer of 2008, and in his August 11 letter to the CCA, Mr. Tabler did not seek to remove his attorneys; he only sought to waive his habeas proceedings. Nevertheless, the court withheld any investigation funding beginning in May, on the basis of its ex parte and unrecorded conference with counsel about Mr. Tabler's desire to waive. And long before the September 30, 2008 hearing, state habeas counsel appeared to already have orchestrated their exit, conducting no investigation through the months between the ex parte conference and the September 30 waiver hearing. As an afterthought on September 30—and apparently without Mr. Tabler present—the following discussion occurred regarding representation:

> The Court: I forgot to say that I would keep you on as standby counsel. I intend to do that. We should -- I should have told him that.
>
> Mr. Schulman: *We have already told him that, Your Honor,* and made it clear to him in letters that one thing has got nothing to do with the other. We will stay on as his representatives to whatever extent he wants so long as he's in the system.
>
> I just want to make clear that – I presume the Court is not going to be granting requests for additional funding that we have made, and that Mr. Jasuta and I are released, if you will, from further actions in this case, in the –

. . . .

The Court: Yes. . . .

V.CR.368.

279. The colloquy reflects the self-contradictory idea, apparently shared by state habeas counsel and the court, that counsel would not be entitled to funds for investigation, would be required to perform no other actions, yet would "stay on as his representatives." Both court and counsel apparently confused the situation of a defendant whom a court allows to proceed pro se with the assistance of standby counsel in trial proceedings with that of a defendant who wishes to waive the right to state habeas proceedings.

280. This notion of a special category of "standby" representation in which counsel does nothing for their client finds no support in the text of the statute or Texas law. In unambiguous terms, Section 3(a) of Article 11.071 states that counsel "shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus." Tex. Code Crim. Proc. art. 11.071 § 3(a). The only explicit provision for waiver of the right to post-conviction counsel comes before counsel is appointed. *See id.* § 2(a) (permitting an applicant to knowingly and voluntarily waive *appointment* of counsel). And, as noted above, the CCA has construed the statute to require counsel to continue investigating even *after* a client has waived. *Reynoso II*, 257 S.W.3d at 720 n.2.

281. State habeas counsel made clear that they understood this "standby" role as distinct from the statutory appointment. As the order that state habeas counsel drafted for the trial court states, "Mr. Schulman and Mr. Jasuta are hereby released from responsibilities arising from their respective appointments. Mr. Schulman and Mr. Jasuta are hereby appointed

standby counsel." V.CR.372. This arrangement violated the clear language of the statute and the CCA's interpretation of those provisions in *Reynoso II*. Counsel's attempt to shirk responsibility was a mistake of law that fell below professional norms. *See Canales*, 765 F.3d at 569. It was also an abandonment that left Mr. Tabler "without any functioning attorney of record." *Maples*, 132 S. Ct. at 927. Nor did Mr. Tabler know that he would be left "to fend for himself" should he decide to "pick up" his appeals. *Id.* As state habeas counsel themselves acknowledged, they informed their client that "one thing"—i.e., decision to waive—"has got nothing to do with the other"—i.e., representation. Yet counsel did cease to act on their client's behalf following September 30. Therefore, in addition to amounting to deficient performance in light of the state-law mistakes counsel made, state habeas counsel's abandonment qualifies as cause under *Maples*. State habeas counsel severed their relationship with Mr. Tabler following the hearing without Mr. Tabler receiving notice.

F. State Habeas Counsel's Failure To Take The Most Basic Investigative Steps Was Unreasonable; This Failure Ensured That Petitioner Could Not Know His Potential Habeas Issues And So Could Not Make A Knowing Decision Whether To File.

282. Counsel's failed to investigate and develop Mr. Tabler's substantial claims of ineffective assistance of trial counsel long before Mr. Tabler had purportedly waived his post-conviction remedies. As a result, Mr. Tabler lacked any knowledge about the claims he was giving up and his purported waiver of habeas review was unknowing and invalid. *See Ex parte Reedy*, 282 S.W.3d 492 (Tex. Crim. App. 2009). Counsel was deficient for failing to take the necessary investigative steps to ensure that Mr. Tabler could make a knowing decision about whether to file under state law. Furthermore, counsel was deficient for failing to conduct a thorough investigation of Petitioner's background and mental health, which would have

uncovered substantial evidence of congenital brain damage and other impaired functioning that undermined the competency and voluntariness of any putative waiver of his rights.

283. Until May 2008, when state habeas counsel ceased investigating for all intents and purposes,[27] state habeas counsel had not completed the most basic tasks of post-conviction representation. State habeas counsel still lacked the files of trial counsel Bucky Harris, John Donahue, and Jack Holmes (though he had received a small file from pre-trial counsel Russ Hunt). Nor had state habeas counsel followed up on getting records from any of the dozens of individuals mentioned in Alma Lagarda's report. Nor had state habeas counsel interviewed a single witness.

284. In *Reedy*, the habeas applicant had pled guilty and waived his right to state habeas review in exchange for a life sentence in a capital case. *Id.* at 494. He thereafter filed a state habeas corpus application notwithstanding his waiver. The trial court recommended dismissal of the habeas application pursuant to the terms of Reedy's plea agreement.

285. The CCA first determined that an express waiver of the right to post-conviction habeas corpus relief may be enforceable only when it is "knowingly and intelligently executed." *Id.* at 495-96. The Court continued that in order to "knowingly and intelligent" waive his right to a post-conviction writ, an applicant must be "in a position to know the nature of the claims he could have brought on [habeas review] but for his waiver. *Id.* at 498. Knowing and intelligent waiver is only possible where an applicant knows or should have known "the particulars of" the claims at the time of the waiver:

> Obviously, many constitutional claims that might be brought by an applicant in a post-conviction application for writ of habeas corpus will be claims that he could have anticipated at the time of his waiver—claims based upon purported defects

[27] Besides receiving the report of Dr. Kit Harrison, state habeas counsel took no other investigative action on Mr. Tabler's after May 2008.

> that are known (or that could have been known with due diligence and the assistance of counsel) to the applicant—at the time of his waiver. . . . He knows (or should know) the particulars of what he is foregoing and therefore does so knowingly and intelligently.

Id.

286. However, an applicant cannot have made a knowing and intelligent waiver of claims that "were not within the applicant's knowledge or comprehension . . . at the time he agreed to waive the right to pursue an application for writ of habeas corpus." *Id.*

> Claims such as actual innocence based on newly available evidence, the suppression of material, exculpatory evidence by the State, and ineffective assistance of counsel will often (although not always) meet this description. Often an applicant cannot be expected to have known about the existence of the facts that support such claims at the time of his waiver. When it comes to claims of this type, the applicant's waiver of habeas relief cannot be knowing and intelligent, and cannot, therefore, be enforceable.

287. *Id.* Cases concerning knowing waiver of constitutional rights reinforce the Texas courts' position. *See Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (quoting *Zerbst*, 304 U.S. at 464, 466); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (A guilty plea must be a "voluntary and intelligent choice among the alternative courses of action open to the defendant."); *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (A defendant entering a guilty plea must possess "an understanding of the law in relation to the facts.").

288. Under this standard, Mr. Tabler's purported waiver of claims in habeas cannot be enforceable. State habeas counsel abandoned Mr. Tabler and failed to investigate and develop his case, despite clear statutory and ethical duties requiring them to do so. Without the assistance of state habeas counsel, Mr. Tabler "could not reasonably have known about" any claims relying on extra-record evidence. The facts underlying Petitioner's claim of ineffective assistance of trial counsel for failure to investigate, develop, and present mitigating evidence,

among others, "did not exist or were not within [his] knowledge or comprehension" when Mr. Tabler indicated his desire to waive his state habeas proceedings.

289. Dr. Harrison's letter underscores Mr. Tabler's lack of understanding. He writes that "Although [Tabler] understands there may have been varying degrees of possible trial error which resulted in his conviction, his knowledge understandably weakens when it comes to all the legal possibilities which could result in a possible suspension of the death sentence." A932.

290. State habeas counsel unreasonably failed to conduct a habeas investigation beyond making a preliminary assessment of what had to be done. This failure left Petitioner without an understanding of the most basic facts about his potential habeas claims. Without these facts, Petitioner was incapable of making a knowing decision whether to file or waive.

G. State Habeas Counsel's Failures Prejudiced Petitioner By Preventing Him From Making A Knowing And Intelligent Decision Whether To Waive And Permitting Him To Involuntarily Choose To Waive.

291. State habeas counsel's conduct prejudiced Mr. Tabler's state habeas proceedings. But for counsel's unprofessional errors there is a reasonable probability that Petitioner would have presented his ineffective assistance of trial counsel claims to the state habeas court. As in this Court, Petitioner would have been found involuntary to make the decision not to file. Even if he had been able to make a competent and voluntary decision, Petitioner would not have waived had counsel continued their representation of their client as state law required, informed their client of the true deadline to file, and conducted a minimally adequate investigation so that Petitioner knew what he was giving up. As a result, Mr. Tabler's meritorious claims of trial counsel's ineffectiveness were never heard. Those violations of federal law establish the actual prejudice of the default. *Martinez*, 132 S. Ct. at 1316.

1. There Is Strong Contemporary Evidence That Mr. Tabler Would Have Decided To File A Habeas Application But For Counsel's Numerous Errors.

292. Petitioner can show a reasonable probability that, but for counsel's errors, he would not have sought to waive and would have raised his meritorious trial ineffectiveness claims in a timely application. *See Lockhart*, 474 U.S. at 59.

293. During the period between the September 30 "waiver" and the November 17 deadline for Mr. Tabler's habeas petition, when Mr. Tabler was entitled under Texas law to change his mind, counsel had no communication with him and considered themselves "released" from litigating his state habeas petition. There is a reasonable probability that, if they had continued their statutory and constitutional role as advocates, Mr. Tabler would have reinstated his state habeas proceedings during that time. Mr. Tabler's cellphone calls to Senator Whitmire indicate that Mr. Tabler wanted to resume his habeas proceedings. As Mr. Tabler confided to the state senator, "I want you to help me appeal my case. The system thinks I've given up my appeals but if you could help me find a pro bono attorney I would appeal it." October 22, 2008 video. Despite these statements about their client's desire to continue his proceedings made in public hearings and repeated in media outlets, state habeas counsel did not react, because they believed their job was already done.

294. Mr. Tabler's request to reinstate his proceedings on June 9 also supports the notion that he would have decided to go forward with filing earlier had counsel investigated at all, remained on as Mr. Tabler's counsel, and given him a true deadline for his decision. Indeed, Mr. Tabler was very eager with any attempts to investigate and develop his claims. *See, e.g.*, A230; A210; (describing shortcomings of mental health issues at trial); A213 (requesting transcripts); A220 (describing possible guilt-phase issue with murder weapon). He frequently expressed interest in state habeas counsel's progress in developing claims. *See, e.g.*,

A278 (asking what Mr. Schulman thought of possible claims after reading the record). This shows that there is a reasonable likelihood that Mr. Tabler would have been swayed by state habeas counsel's investigative efforts in making a decision to file.[28]

[28] This differentiates Mr. Tabler from the defendant in *Schriro v. Landrigan,* 550 U.S. 465, 477 (2007). If state habeas counsel had conducted an in-depth investigation, evidence shows that Mr. Tabler would not block the presentation of such evidence.

II. TEXAS'S APPLICATION OF ITS PROCEDURAL BARS IS INADEQUATE TO FORECLOSE MERITS REVIEW IN FEDERAL COURT.

295. This Court can decide that Petitioner is entitled to *de novo* review on a second, independent basis: the state procedural bar that precluded review of the merits of Petitioner's claims in state court was inconsistently applied and therefore inadequate to foreclose review in federal court.

296. Under the doctrine of procedural default, a federal court may not "review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez*, 132 S. Ct. at 1316 (citations omitted). The state court's procedural bar must be "independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). To be "adequate" to preclude federal merits review, the state court bar must have been "clear," "firmly established and regularly followed" at the time that the petitioner purportedly violated the rule. *See James v. Kentucky*, 466 U.S. 341, 348 (1984) (state rule must be "clear," "firmly established and regularly followed"); *Ulster County Ct. v. Allen*, 442 U.S. 140, 150-51 & nn.8-9 (1979) (state rule must be "clear"). And "adequacy is itself a federal question" that this Court has sole responsibility to decide. *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quotation omitted). Texas's denial of Petitioner's request to reinstate his state habeas application was based on an unreliably faulty waiver hearing and an overturned decision, and was inadequate to preclude federal habeas review.

297. In similar circumstances, the Fifth Circuit has found Texas's procedural bars inadequate. *Jones v. Stephens*, No. 14-70007, 2015 WL 2386115, at *5 (5th Cir. May 20, 2015) (unpublished) (finding procedural bar applied to claim in capital habeas applicant's timely "errata" inadequate because Texas law "le[ft] open the possibility that had the

supplemental documents been timely filed the Texas courts would not necessarily be barred from considering them"); *Reed v. Quarterman*, 555 F.3d 364, 369-70 (5th Cir. 2009) (holding inadequate CCA's "puzzling" application of bar to a capital habeas applicant's *Batson* claim that totally departed from all prior and subsequent precedent); *Rosales v. Dretke*, 444 F.3d 703, 707-10 (5th Cir. 2006).

A. Texas's Relaxed Approach to Untimely Applications Under Section 4A

298. Texas's capital habeas statute is "built upon the premise that a death row inmate *does* have one full and fair opportunity to present his constitutional or jurisdictional claims in accordance with the procedures of the statute." *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002). In 1995, the Texas Legislature passed a new habeas statute, Tex. Code Crim. Proc. art. 11.071, applicable only to defendants convicted of capital murder. 1995 Tex. Sess. Law Serv. Ch. 319 (S.B. 440) (West). Unlike its predecessor statute, the new statute provided for automatic appointment of "competent counsel," set out specific deadlines to file initial applications, and imposed a stringent "abuse of writ" doctrine (Section 5) that limited successive petitions, *inter alia*. *See generally* 43B George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice & Procedure* § 58:64 (3d ed. 2014). But the 1995 capital habeas statute lacked a provision for untimely filing of an initial application. As a result, the CCA determined, over bitter dissent, that "[l]ate filing [was] permitted only if the claims could not have been presented timely or if there was a violation of the United States Constitution, but for which the applicant would not have been found guilty or sentenced to death." *Ex parte Smith*, 977 S.W.2d 610, 611 (Tex. Crim. App. 1998) (citing Section 5); *see also id.* at 613 (Baird, J., dissenting) (arguing that legislative intent aimed to give applicant his "one bite at the apple" in spite of applicant's counsel's failures); *id.* at 614 (Overstreet, J., dissenting) (arguing that the majority disposed of untimely petitions inconsistently).

299. In 1999, the Texas Legislature amended the capital habeas statute to add Section 4A, providing for a new procedure to permit untimely filings in some circumstances. 1999 Tex. Sess. Law Serv. Ch. 803 (H.B. 1516) (West). Instead of holding tardy applicants to the difficult-to-meet standard of Section 5, the statute now provided:

300. On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date. . . . At the conclusion of the counsel's presentation to the court of criminal appeals, the court may . . . appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

301. Tex. Code Crim. Proc. art. 11.071 § 4A.

302. When an applicant's counsel makes mistakes, leading to untimely filing, that are not attributable to the applicant, the Texas Court of Criminal Appeals has given the applicant the chance to have a single "bite at the apple" by finding "good cause" under Section 4A. Through a series of unreported slip opinions, the Court of Criminal Appeals has created a body of case law interpreting "good cause" leniently, granting applicants the opportunity to file otherwise untimely applications under Section 4A when counsel has made some mistake.

303. Time and again, the CCA has found "good cause" for technical errors, honest mistakes, and sundry equitable reasons. *See, e.g.*, *Ex parte Bigby*, WR-34,970-02, 2008 WL 5245356 (Tex. Crim. App. Dec. 17, 2008) (good cause found for "a simple miscalculation of the dates"); *Ex parte Murphy*, WR-70,832-01 (Tex. Crim. App. Mar. 25, 2009) (good cause found where motion for extension of time filed after deadline due to counsel's misreading of

statute). The CCA has found good cause where "the State fail[ed] to challenge [counsel's honest] mistake." *Ex parte Brown*, WR-68,876-01, 2008 WL 152724 (Tex. Crim. App. Jan. 16, 2008). It has found good cause where counsel missed *two* habeas application deadlines and stated that he was hospitalized for a mere four days over two months before the application was due. *Ex parte Segundo*, WR-70,963-01, 2009 WL 190162 (Tex. Crim. App. Jan. 28, 2009); *Ex parte Carter*, WR-70,722-01, 2009 WL 190161 (Tex. Crim. App. Jan. 28, 2009). It has found good cause for unstated reasons in a case where the application was filed over six months late. *Ex parte Gongora*, WR-60115-02, 2006 WL 173106 (Tex. Crim. App. Jan. 25, 2006). It has found good cause where counsel had not even moved to show good cause and the circumstances causing the untimely filing were "primarily" beyond counsel's control. *Ex parte Gobert*, WR-77,090-01, 2012 WL 479689 (Tex. Crim. App. Feb. 15, 2012); *see also Ex parte Cortez*, WR-78,666-01, 2013 WL 458197 (Tex. Crim. App. Feb. 6, 2013) (waiving requirement of showing of good cause and addressing merits of application signed on due date but not field until five days later).

304. The CCA is so committed to the principle that an applicant have one full and fair opportunity to present his claims that it has even ensured that applicants who fail to show good cause can receive the benefit of a 4A remedy—i.e., appointment of new counsel and the opportunity to file a new application. *See Ex parte Medrano*, WR-78,123-01, 2012 WL 5452694 (Tex. Crim. App. Nov. 7, 2012) (good cause not found where original counsel's filing was four years overdue, but still appointing new counsel to prepare a new application); *see also Ex parte Castillo*, WR-70,510-01 (Tex. Crim. App. April 22, 2009) (after determining original counsel had failed to show good cause for failing to file timely application, CCA appointed new counsel and granted 270 days to file application); *Ex parte Luna*, WR-70,511-01 (Tex.

Crim. App. Oct. 1, 2008) (same); *Ex parte Neal*, WR-70,512-01 (Tex. Crim. App. Oct. 1, 2008) (same); *Ex parte Young*, WR-70,513-01 (Tex. Crim. App. Oct. 1, 2008) (same); *Ex parte Ramirez*, AP-75,167 (Tex. Crim. App. July 7, 2008) (appointing new counsel and granting 270 days to file petition after original counsel failed to timely file application and "ha[d] not even attempted to show good cause.").[29]

305. Only one published case since 2008 has applied the Section 4A rule, and again it confirmed Section 4A's liberal construction. In *Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011), the CCA found good cause established when the applicant's counsel has "intentional[ly] refus[ed] to plead specific facts that might support habeas-corpus relief." *Id.* at 643. The CCA concluded that, even though Medina's counsel had filed a pleading styled "writ of habeas corpus" within the time to file, the pleading was "not a proper writ application under Article 11.071 because it does not allege specific facts." *Id.* at 637. Because the applicant did not file a *proper* writ, the CCA used the remedy available to it under Section 4A:[30] "Under

[29] The Court has also found good cause in *Ex parte Norman*, WR-74,743-01, 2010 WL 4978807 (Tex. Crim. App. Dec. 8, 2010) (application considered timely after counsel for applicant filed application in wrong county, which then forwarded application to correct county after deadline.); *Ex parte Rubio*, WR-65,784-02 (Tex. Crim. App. Sept. 11, 2013) (good cause found in light of difficulty obtaining timely rulings from trial court, and upon applicant's third request, counsel failed to show good cause, but Court still granted additional 30 days to file application.); *Ex parte Smith*, WR-70,593-01 (Tex. Crim. App. Oct. 1, 2008) (good cause found where originally appointed counsel withdrew due to health condition and subsequent counsel diligently pursued case); *Ex parte Blanton*, WR-61,443-01 (Tex. Crim. App., June 22, 2005) (good cause found for reasons not stated); *Ex parte Ramirez*, WR-71,401-01 (Tex. Crim. App. Feb. 11, 2009) (good cause found where originally appointed counsel was removed for failing to file timely application, and subsequent counsel had difficulty obtaining full record); *Ex parte Brewer*, WR-46,587-02, (Tex. Crim. App. Jan. 20, 2012) (good cause found where filing deadline was unclear due to complicated history of case).

[30] The CCA remarked on the fact that both the State and pro bono counsel agreed on this remedy: "[T]his case is doubly *sui generis* because the State agrees that counsel's filing was not a proper habeas-corpus application, and it recommends that this Court proceed under Article 11.071, § 4A. We commend the State for its position . . . ." *Id.* at 643.

these unique and extraordinary circumstances, involving not habeas counsel's lack of competence but his misplaced desire to challenge the established law at the peril of his client, we conclude that under Article 11.071, § 4A(a), counsel failed to file a cognizable writ application." *Id.* at 643. This decision reinforces the broad—but ambiguous—character of the Section 4A procedural bar.

306. In sum, the CCA has construed "good cause" broadly in order to ensure that an applicant receives one bite at the apple. *See id.* at 642.

B. *Reynoso I & Reynoso II*

307. On its facts, the case of Juan Jose Reynoso is almost identical to Petitioner's case. In *Ex parte Reynoso*, the CCA originally denied the applicant's Section 4A motion, but then vacated its decision and granted the 4A motion. *Ex parte Reynoso* (*Reynoso I*), 228 S.W.3d 163 (Tex. Crim. App. 2007), *vacated on reh'g*, *Ex parte Reynoso* (*Reynoso II*), 257 S.W.3d 715 (Tex. Crim. App. July 2, 2008). In Petitioner's case, the state court denied the motion on the basis of the overturned decision in *Reynoso I*. Because *Reynoso I* had been overturned, its application in Petitioner's case was inadequate to preclude federal review.

308. In *Reynoso*, the applicant waffled in his decision to waive his state habeas proceedings, repeatedly invoking waiver and removing counsel and then seeking to revoke waiver and have counsel reappointed. *Reynoso I*, 228 S.W.3d at 164. Mr. Reynoso was "evaluated by doctors, who found that he was competent to choose to forego his habeas proceeding," and was permitted to do so at a hearing. *Id.* He eventually permitted his counsel to file an application on his behalf, but the application was ruled untimely. *Id.* at 164-65. Initially, the CCA dismissed the application. *Id.* at 166. The Court held that Reynoso could

not show "good cause" because the untimely filing is "attributable to applicant's own continued insistence on foregoing any such remedy." *Id.*

309. Just a few months later, however, the CCA ordered rehearing on the case. *Ex parte Reynoso*, No. WR-66,260-01, 2007 WL 2660265, at *1 (Tex. Crim. App. Sept. 12, 2007). On rehearing, the CCA reconsidered its earlier finding of no good cause. *Reynoso II*, 257 S.W.3d at 717. The CCA determined that it was incorrect to "focus[] solely on applicant's behavior and actions in [*Reynoso I*]." *Id.* at 723. Considering counsel's actions, too, the Court determined there was "good cause" where Reynoso's "tardiness in filing was due to [counsel's] mistaken, but not totally implausible, interpretation of the law," notwithstanding Reynoso's own waffling on his decision to waive. *Id.* at 723. Therefore, the CCA held in *Reynoso II* that technical mistakes of law can provide "good cause" even where the applicant's conduct contributes to the untimely filing.

C. The CCA Applied An Inadequate Procedural Bar—The Overruled *Reynoso I*—In Denying Petitioner's Section 4A Motion To Reinstate His State Habeas Proceedings.

310. On June 9, 2009, Petitioner wrote the trial court announcing his desire to reinstate his state habeas proceedings. On July 14, 2009, Mr. Schulman and Mr. Jasuta submitted a Motion to Permit Counsel to Continue or Resume Representation of the Applicant and To Establish a New Filing Date for the Application. Schulman and Jasuta argued that the trial court had failed to notify the CCA of the lack of filing after the deadline passed and their client "should not have been permitted" to waive. A942. On September 16, 2009, the CCA denied the motion, applying *Reynoso I*, which had already been overturned, and quoting its dead-letter rule. Mr. Tabler had no good cause because the untimely filing was "attributable to Applicant's own continued insistence on foregoing any such remedy." A41 (quoting *Reynoso I*, 228 S.W.3d at 166).

311. The opinion in *Reynoso I* "constitutes the decision of the Court and carries precedential weight which the bench and bar are obliged to follow unless the Legislature overturns it or at least five judges on this Court overrule it in whole or in part." *Reynolds v. State*, 4 S.W.3d 13, 15 (Tex. Crim. App. 1999). But after *Reynoso II* overruled *Reynoso I*, it could no longer be good law. Indeed, no reported opinion of the CCA has applied *Reynoso I*. Application of this overturned precedent demonstrates that the bar actually applied to Petitioner's case was far from firmly established or regularly followed. *See James*, 466 U.S. at 345-48 (finding state procedural bar "inadequate" where "[t]he substantive distinction between admonitions and instructions is not always clear or closely hewn to"); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).

D. The Evidentiary Hearing On Mr. Tabler's Waiver Was An Inadequate Bar, Given The Court's Irregular Procedures, Superficial And Incomplete Inquiry, Incorrect Statements About The Rights Mr. Tabler Was Waiving, And The Non-Adversarial Nature Of The Hearing.

312. The CCA's application of a procedural bar was premised on the factual finding of waiver by the trial court. *See* A41 ("However, the record of the trial court's hearing on September 30, 2008, demonstrates that Applicant made a knowing and voluntary choice to waive review."). This determination underlies the court's application of a procedural bar and is inadequate to prevent this Court from reviewing the merits of Mr. Tabler's claims. Numerous courts have found state determinations of waiver of habeas proceedings inadequate to sustain a procedural default in federal court. *See, e.g.*, *Fahy v. Horn*, 516 F.3d 169, 180 (3d Cir. 2008); *O'Rourke v. Endell*, 153 F.3d 560, 569 (8th Cir. 1998); *St. Pierre v. Cowan*, 217 F.3d 939 (7th Cir. 2000); *cf. Mata v. Johnson*, 210 F.3d 324, 331 (5th Cir. 2000) (finding federal habeas waiver proceedings inadequate on due process grounds).

313. As explained at length above, the state court's hearing produced an unreliable determination as a result of manifest errors of law and procedure. The court's records provided official notice of the hearing four days before it was set to occur. A328. The only indication of a topic for the hearing is that the hearing would be about "Stopping Appeal." *Id.* As a result, neither party had a meaningful opportunity to present witnesses or experts. *See, e.g.*, *Mata*, 210 F.3d at 332-33 (district court's competency determination unreliable in light of the court's failure to "afford[] the parties the opportunity to present testimony or documentary evidence").

314. Adequate procedures for a competency evaluation require the court to "order[] and review[] a current examination by a qualified medical or mental health expert." *Mata*, 210 F.3d at 331. Yet that was not done in this case. The court instead made an unofficial decree that state habeas counsel had to use their defense expert to conduct a competency hearing. There was no official order for an examination.

315. Nor did the circumstances permit review. The hearing transcript makes evident that the court and the prosecutor did not have a meaningful chance to "review" the competency letter provided to them the day of the hearing. *See, e.g.* V.CR.367 (Mr. Proctor: "As you are aware, the usual practice is to have . . . the State submit a motion for the defendant's examination for competency at this time and the Court to order that."). Dr. Harrison was not called to testify and his findings were not subjected to any examination. Particularly in light of Mr. Tabler's documented history of mental illness, this was wholly inadequate. *See, e.g., Mata*, 210 F.3d at 331 (finding district court's finding of competence was unreliable where based on a 12-year old competency evaluation and the court's refusal to consider evidence of Mata's "thirty years of documented mental health problems, . . . repeated suicide attempts and . . . numerous hunger strikes while incarcerated").

316. Moreover, the court's colloquy failed to test whether Mr. Tabler was making a knowing waiver. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."); *Fahy*, 516 F.3d at 186 ("[T]he colloquy failed to adequately probe into Fahy's knowledge of the rights that Judge Sabo asserted he was waiving."). Indeed, the court actually misinformed Mr. Tabler that his ability to file a habeas application was tied to the conclusion of the direct appeal proceedings. The court also did not ask whether Mr. Tabler was making a present decision to waive. Instead the court merely asked whether Mr. Tabler was willing to waive after his direct appeal concluded. *See St. Pierre*, 217 F.3d at 947 ("There was never any kind of proceeding, formal or informal, at which any court was able to assure itself that St. Pierre's waiver in the May 2 letter satisfied the requirements for a knowing and voluntary waiver and that St. Pierre intended it to be a waiver."); *Mata*, 210 F.3d at 331 (requiring court to "question[] the petitioner concerning the knowing and voluntary nature of his decision to waive further proceedings.").

317. The CCA could not rely on the finding of waiver, because the trial court's order granting the waiver was premised on statements and events that never occurred. In its November 5, 2008 order the trial court omitted Petitioner's actual statements. V.CR.371-72. That order should have reflected that Petitioner intended to waive only after his direct appeal ended. Instead, it stated that Petitioner intended to waive—period. V.CR. 371. In another procedural mishap, the trial court made these incorrect findings regarding Mr. Tabler's actual words without the benefit of the court reporter's official hearing transcript, which was not produced until November 12, 2008, seven days after the order was signed. A1011. The Court repeated its error in its January 20, 2009 letter to the Court of Criminal Appeals. There the

court told the high court that "Mr. Tabler stated during September 30, hearing that he wished to waive all further appeals." Again, what the letter left out are four words that Mr. Tabler uttered on September 30: ". . . after my direct appeal." V.CR.362.

318. Worse still, the CCA never received the trial court's Court Exhibit #1, Dr. Kit Harrison's two-page competency letter. Therefore, the CCA did not have the "record of the trial court's hearing," as it stated, and could not rely even on the seriously deficient expert letter. With the letter, the procedural irregularities of the hearing would still be enough to render it inadequate. But without the letter finding competency, the CCA was relying on the trial court's competency determination unsupported by crucial information.

319. Finally, the wholly non-adversarial nature of the hearing critically undermines the reliability of the state court's findings. *See O'Rourke v. Endell*, 153 F.3d 560, 569 (8th Cir. 1998) ("We believe O'Rourke should have been represented by an attorney, either a counsel of record or a 'next friend,' to argue that he lacked the capacity to waive his appeal . . . . The court's failure to appoint such a representative resulted in an evidentiary hearing on O'Rourke's competence that failed to develop adequately all material facts, that was neither full nor fair, and that did not afford O'Rourke the process he was due.") (citation omitted). In *Mata*, 210 F.3d at 331, the Fifth Circuit presupposed the existence of two adversarial "parties"—one advocating for competency to waive, the other challenging it. Without this testing, the waiver hearing is an inadequate basis for the assertion of a procedural default.

In sum, the purported finding of waiver was not an adequate and independent state ground sufficient to support a finding of procedural default, because the waiver hearing was confused, arbitrary, and violated Mr. Tabler's due process rights and because the application of Section 4A was inconsistent with established precedent.

ARGUMENT

I. TRIAL COUNSEL'S DEFICIENT INVESTIGATION, PREPARATION, AND PRESENTATION DEPRIVED PETITIONER OF EFFECTIVE ASSISTANCE AT THE GUILT-INNOCENCE PHASE OF TRIAL.

A. Counsel Provided Ineffective Representation During Voir Dire In Failing To Engage In Meaningful Questioning Aimed At Ferreting Out The Biases Of Prospective Jurors, And In Failing To Object To The Prosecutor's And Court's Misleading Statements About The Law, While Themselves Also Giving Jurors Inaccurate Legal Information.

320. Trial counsel abdicated their critical responsibility to ensure that Mr. Tabler's fundamental right to a fair and impartial jury was secured.[31] Instead of posing probing questions to unearth the biases of prospective jurors, counsel often agreed to dismiss jurors they had not even bothered to question. They failed to follow up on juror responses suggestive of bias and often left out entire lines of questioning, including questions about jurors' death penalty views. As well, counsel did not ensure that jurors received correct definitions of the law, as they both failed to object to the prosecutor's and trial court's misleading characterizations of the law and, in fact, provided their own inaccurate and unhelpful definitions of legal terms. As a result of counsel's deficient performance during voir dire, Mr. Tabler was deprived of his Sixth Amendment right to effective representation, as he did not receive a fair trial before an impartial jury, to his obvious and substantial detriment.

1. Counsel Failed To Conduct An Adequate Voir Dire Examination Of Prospective Jurors.

321. As the Supreme Court has explained, "[v]oir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be

[31] Voir dire was conducted over the course of eleven days beginning February 12, 2007, and ending March 12, 2007, with the selection of twelve jurors and two alternates. *See* Reporter's Record, Volumes 10–20.

honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Morgan v. Illinois*, 504 U.S. 719, 729-30 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion)). It "is designed to insure, to the fullest extent possible, that an intelligent, alert, disinterested, impartial and truthful jury will perform the duty assigned to it." *Armstrong v. State*, 897 S.W.2d 361, 363 (Tex. Crim. App. 1995). The Texas Court of Criminal Appeals has recognized that in order "[t]o make a satisfactory determination of whether a veniremember would be acceptable, the scope of voir dire is necessarily broad." *Raby v. State*, 970 S.W.2d 1, 10 (Tex. Crim. App. 1998). A criminal defendant in Texas "is generally entitled to voir dire prospective jurors on any matter which will be an issue at trial." *Dinkins v. State*, 894 S.W.2d 330, 344 (Tex. Crim. App. 1995).

322. In order to ensure the right to an impartial jury, defense counsel "must be diligent in eliciting pertinent information from prospective jurors during voir dire in an effort to uncover potential prejudice or bias [and] has an obligation to ask questions calculated to bring out information that might indicate a juror's ability to be impartial." *Walker v. State*, 195 S.W.3d 250, 256 (Tex. Crim. App. 2006). Where a prospective juror's responses suggest bias, counsel "ha[s] a duty to further question the prospective jurors to discover if there [is] actual bias that could form the basis of a challenge for cause and to intelligently exercise [the defendant's] right to peremptory challenges." *Id.* at 257. Mr. Tabler's attorneys miserably failed at this duty and their deficient performance at voir dire prejudiced their client.

a. Mr. Tabler's Lawyers Often Asked No Follow-Up Questions To Ascertain Prospective Jurors' Views When Their Earlier Answers On Voir Dire And In Their Questionnaire Responses Raised Concerns About Their Ability To Be Fair.

323. Numerous jurors gave questionnaire responses and testimony in voir dire that suggested they were biased and thus unqualified to serve on Mr. Tabler's jury. Defense counsel, however, failed to follow-up with questions to determine whether these jurors were competent to serve or instead should be challenged for cause or peremptorily. As a result, several jurors who sat on Mr. Tabler's jury were likely partial and should have been excused. Moreover, counsel squandered peremptory challenges on other prospective jurors who would have been the subject of cause challenges had counsel conducted an adequate voir dire examination to elicit their partiality, as counsel were duty-bound to do. *See, e.g.*, *Armstrong*, 897 S.W.2d at 363-64 ("[D]efense counsel has an obligation to ask questions calculated to bring out that information which might be said to indicate a juror's inability to be impartial and truthful.").

324. **Karen Lindburg, Juror No. 74.** Seated juror Karen Lindburg, for instance, wrote in her questionnaire[32] that she believed "the death penalty serves 2 purposes: a deterrent of an act of violence [and] * elimination of a threat to society," and observed that it should be used "if it can be proven that the accused would . . . be a threat – it should be used."[33] (Questionnaire at Q. 89). When questioned by the prosecutor, she explained that she wouldn't want the death penalty "if somebody in my family was wrongly accused," noting "it's just you want to give them the benefit of the doubt." 18.RR.13. She explained her views further during defense counsel's questioning:

[32] Counsel will file the juror questionnaires separately, along with a motion to file them under seal.

[33] Lindburg wrote that "if it can be proven that the accused would *not* be a threat – it should be used," Q. 91, but she explained in voir dire that this was a mistake she made because it "was a long afternoon." 18.RR.13 (emphasis added).

> Q. You can imagine that there are a lot of folks who say, if he's proven guilty then the death penalty ought to be given.
>
> A. That's not fair.
>
> Q. Why not?
>
> A. Well, a lot of it can be proven guilty of as, he said before, you can [be] proven guilty if it's there of [sic] death, but if you're not – say if you were – killed somebody because of protecting somebody else, like I told him, you know, I'd rather sit in jail knowing that I killed someone to protect my kid, I don't think I would do all the killing I was going to do. I'm not going to go out and be on a rampage to help everybody, you know, to protect their kids. Does that make sense?

18.RR.27. Clearly, this juror had no idea what a conviction for capital murder entailed and thus her testimony about her death penalty views provided little to show she was qualified to serve on a capital jury.[34]

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[34] In order to serve, a capital juror in Texas must be willing to consider a life sentence on the basis of the mitigating evidence despite finding beyond a reasonable doubt (1) that the defendant is guilty of capital murder and (2) that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071 Section 2(b)(1). *See Morgan v. Illinois*, 504 U.S. 719, 736 (1992) (jurors who "would automatically vote to impose the death penalty if the defendant is found guilty of a capital offense, no matter what the so-called mitigating factors, whether statutory or nonstatutory, might be . . . obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: They not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it").

Yet, it is likely few prospective jurors in Mr. Tabler's case understood the elements of capital murder at the time they answered questions about their death penalty views. During the general voir dire, conducted *en mass* on February 12, 2007, the prosecutor explained the elements of capital murder to the pool of prospective jurors. *See* 10.RR.61-62. Individual voir dire did not begin until more than a week later, on February 20, 2007, and continued through March 12, 2007. *See* 11.RR.1; 20.RR.1. During individual voir dire, neither the court nor the lawyers refreshed the memories of most of the prospective jurors regarding the elements of the offense as they questioned the jurors about their ability to consider both sentencing options. In the absence of an effort by the parties and court to make sure that jurors understood the meaning of a capital murder conviction when answering questions, jurors' assurances they could consider both punishments carry little weight in demonstrating their ability to serve as fair and impartial decisionmakers.

325. Although defense counsel promptly explained that someone who killed in order to protect their child "shouldn't even go to jail," *id.*, he did not explain the elements of capital murder in Texas and did not follow-up with any questions about whether Lindburg would automatically impose the death penalty if she found the defendant guilty of capital murder and found beyond a reasonable doubt that he would be a continuing threat. The juror's testimony that she would consider the evidence before determining punishment accordingly had little meaning in showing her ability to sit as a capital juror, because defense counsel made no effort to ensure that she understood that she would be called upon to determine if someone guilty of capital murder, who was determined to be a likely threat to the physical safety of others, should nonetheless be spared the death penalty based on the mitigating evidence presented.

326. Without having a meaningful understanding of Juror Lindburg's death penalty views, the defense accepted her as a juror and she sat in judgment of Mr. Tabler. 20.RR.10.

327. **John Thomas Gauntt, Juror No. 105.** Seated juror John Thomas Gauntt, a lawyer, stated in his questionnaire responses that he had been opposed to the death penalty "when I represented those charged" (Questionnaire at Q.62), but that he felt the death penalty "should be given in cases where there is no other choice." (Questionnaire at Q. 62, 89). Other than the death penalty questions in the questionnaire – the answers to which were inscrutable – Juror Gauntt was not asked a single question to elicit his opinions about the death penalty. The prosecutor asked a series of leading questions to elicit agreement that the death penalty should be reserved for the "worst criminals," 19.RR.72; and that it made sense that the word "society" be construed to be "where you are" when answering the continuing threat question, 19.RR.73; that proof the defendant would be a continuing threat was essentially linked to Gauntt's belief

the punishment was a "last resort," 19.RR.72;[35] and that it made sense for jurors to determine whether there are any reasons sufficient to justify life instead of death, 19.RR.73, and that jurors should "have to agree that there are mitigating circumstances[t]hat are sufficient," 19.RR.74. Defense counsel learned that Gauntt had once tried a capital case when he "was about eight months out of law school" and that Gauntt agreed there had been "[l]ots of changes since then." 19.RR.77.[36] Counsel did not ask Gauntt any other questions about the capital case on which he had worked decades ago, such as its result. Nor did they ask a single question intended to elicit the juror's beliefs about the death penalty, even though it was clear from Gauntt's questionnaire responses that he favored it for certain cases – where it was a "last resort" – and did not provide any answers from which counsel could ascertain that he could fairly consider a life sentence in Mr. Tabler's case.[37]

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[35] The prosecutor's questioning suggests that Juror Gauntt's "last resort" standard would be satisfied by a "yes" response to the continuing threat question:

> Q. If they are a continuing threat to society, that puts them on the death penalty eligible list. * * * When we get to this stage, you legally don't have any presumption that a life sentence is appropriate, but you kind of practically do because unless we prove that, it's a life sentence.
>
> If we do prove it, then it's almost as if the death sentence is the appropriate one because he's met the test. Worst crime, worst criminal. But this, we've talked about as being the last resort question. And do you agree that that's exactly what the question is?
>
> A. Yes.

19.RR.74.

[36] Gauntt's experience with trying a capital case occurred before *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), led to dramatically different capital sentencing schemes, including the sentencing procedure adopted in Texas, *see Jurek v. Texas*, 428 U.S. 262, 268-69 (1976) (plurality opinion). According to his questionnaire, he began law school in 1968, Questionnaire Q. 30, and, according to the Texas Bar Directory, he graduated from Baylor Law School in August 1970. *See* https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=168758 (last reviewed August 28, 2015).

[37] Nor did the defense (or anyone) question Gauntt about his questionnaire response indicating his son was a "juvenile prosecutor – Bell County." (Questionnaire at Q. 26). He was

328. Defense counsel had no idea what Gauntt's views about the death penalty were, apart from its suitability as a "last resort," when they accepted him as a juror. 20.RR.12.

329. **Laticia Marie Rudd, Juror No. 58.** Seated juror Laticia Marie Rudd indicated the following on her questionnaire:

> Q: What are your feelings about the death penalty? Please explain?
>
> A: If it is justified beyond a reasonable doubt I agree – if it is not beyond a reasonable doubt I don't agree. I am open[.]
>
> Q: What purpose, if any, do you think the death penalty serves in our society?
>
> A: If crime was ~~hanis~~ haynest [sic] without any remorse murdered intentionally children
>
> Q: Do you think the death penalty in Texas is used too often or too seldom? Why?
>
> A: No, I have only heard of a few

She expanded on her views when questioned by defense counsel:

> Q. [I]f I had seen you a couple of weeks ago and I asked you what your thoughts are about the death penalty in general before you came and talked to any of us, before you learned anything about the questions or whatever, what would your thoughts or feelings have been?
>
> A. It would be the same as what I answered. I feel like if you have no remorse and you intentionally did something to hurt someone, and it's very heinous and you just – you have no – how can I say – no – what is the word I'm looking for? You have no –sometimes some people can be numb to human life, I think. They don't care.
>
> * * *
>
> But as I feel like if something happened and you – I don't know if I should say crime of passion or, you know, something happened and something enrages you or pushed you in a corner and it's your life or my life, that you should be put to death for that. I don't agree with that because I feel like your life or their life and you were defending yourself that's one thing, but if you intentionally set out and some people do, they write a note and they're going to do this, this, and this today and they do this, this, this today. You – you consciously thought about doing

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not asked a single question by anyone regarding his son's position and whether it would have any impact on his ability to serve. *See* 19.RR.66-84.

> harm to someone that that's not good. But I don't feel like if – if you realize what you've done and you know, well, we – I guess we don't – we can't predict the future but if you know that, or you feel I guess beyond a reasonable doubt that it won't ever happen again, then you should put them in prison for life, but if you do something that you just really – you have no remorse about, that's different. * * * Because you don't care about human life.

15.RR.155-56.

330. Although defense counsel clarified that a defendant has the right to remain silent, 15.RR.156-57,[38] and that a person who killed in self-defense would not be guilty of a crime, 15.RR.158-60, he made no effort to ascertain whether Rudd could consider a life sentence if she found that the defendant had intentionally killed, had committed a heinous crime and/or had not shown remorse, and her questionnaire and voir dire responses suggested otherwise. Nonetheless, counsel accepted her as a juror, 20.RR.9, and she voted to impose the death penalty on their client.

331. Counsel also made little effort to ascertain whether this juror would be biased as a result of pending criminal charges against her husband for domestic abuse against her. Rudd disclosed on her questionnaire:

> 42. Have you, or any member of your family ever been arrested?
>
> Yes (X) No ( )
>
> If "YES" please describe the time frame and event(s):
>
> Oct 06, assault, spouse Charges will be dropped – pending Feb 23 talked to prosecutor

During individual voir dire on February 27, 2007, Rudd confirmed to the prosecutor that the charges were being dropped:

[38] Juror Rudd responded that remorse "doesn't have to be express like you say, okay, well, I'm sorry," 15.RR.157, but did not indicate she would not require the defendant to show remorse in order to impose a life sentence.

Q. And then you made a note here October 6th assault and I'm guessing are you the victim in that?

A. Yes.

Q. Okay. But you have talked to the prosecutor and the charges are going to be dropped on that?

A. Yes.

15.RR.141. Defense counsel elicited only slightly more information:

Q. Well, your – I don't mean to bring this up, it's a sore subject, but you said you were the complaining witness in an assault case?

A. Yes.

Q. Is that involving your husband?

A. Yes.

Q. Okay. I guess you were making a judgment call when you decided you wanted to go to the DA's office and drop the charges, you're making a judgment call about his background, about his character and about I guess probability for the future when you decide to do that?

A. Correct.

15.RR.157-58. Rather than asking Rudd what the status of the charges was and whether that would impact her ability to sit in judgment, both the prosecutor and the defense assumed in their questions that the charges against Rudd's husband were being or had been dropped, and Rudd acquiesced in the versions articulated by counsel.

332. At the time of the voir dire and throughout Mr. Tabler's trial, the charges against Rudd's husband had not, in fact, been dropped. Rudd's testimony to the contrary was false and the circumstances of the criminal prosecution of her husband clearly jeopardized Rudd's ability to sit as a fair and impartial juror in Mr. Tabler's trial, as she could have believed she needed to curry favor with the State as a means to ensure that the charges against her husband were eventually dropped.

333. Rudd's husband, Nakia D. Rudd, was arrested on October 9, 2006, and charged with violating Tex. Pen. C. 22.01(a)(1), assault with bodily injury – family/household member, for striking Laticia Rudd "on and about the head and face and body." Criminal Complaint dated October 9, 2006. A1001. The Affidavit Submitted for Probable Cause Determination that same day further described the assault:

> Upon arrival I met with the complainant who was identified as Laticia M. Rudd B/F DOB: [redacted]. Mrs. Rudd stated that her husband, identified as Nakia D. Rudd B/M DOB: [redacted], had hit her on the head with his fists, causing pain. Mrs. Rudd also stated that her husband had drug her down the road, with his vehicle, causing visible injuries and pain.

A1002. A criminal information formally charging Nakia Rudd was filed on November 17, 2006. A1002. Apparently, Nakia Rudd was willing to accept responsibility for the charges because his attorney, on January 16, 2007, filed a Case Setting Form (CSF) indicating that "the Defendant requests that his case be set for: . . . Plea of Guilty or Nolo contender pursuant to a plea agreement with the State." A1005. The CSF set the plea for February 23, 2007, at 10:00 a.m. *Id.* On February 20, 2007, a week before Laticia Rudd was questioned in voir dire, the State and defense filed an Agreed Motion for Continuance of the February 23, 2007, plea hearing, and the negotiated guilty plea hearing was reset for March 23, 2007. A1006.[39]

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[39] On March 21, 2007, the parties again filed an Agreed Motion for Continuance, this time because "[Defendant] has not pd his atty fees." A1007. The negotiated guilty plea hearing was reset for April 20, 2007. *Id.* On April 20, 2007, the parties filed yet another Agreed Motion for Continuance, seeking a continuance because "[Defendant] has not completed anger management class." A1008. The negotiated guilty plea hearing was reset for May 25, 2007. *Id.* On May 23, 2007, the state dismissed the charges against Nakia Rudd, with the explanation:

> *Although all of the elements of the offense herein are present and the State is ready to proceed to trial, this Motion to Dismiss is made pursuant to a plea agreement with the Defendant for the following reason indicated:*
>
> ** * * Defendant successfully completed appropriate counseling as agreed in return for dismissal of the case herein.*

334. All of this information was of vital importance to assess Rudd's competence to sit as a juror in Mr. Tabler's case, yet defense counsel was unaware of it because he failed to engage in any probing questions regarding the prosecution of her husband to determine whether she was subject to a challenge for cause or to aid the intelligent exercise of peremptory challenges. Instead, the defense accepted Rudd as a juror without having asked any meaningful questions regarding those charges and how they would affect Rudd's ability to be fair and impartial. *See, e.g.. Knox v. State*, 29 A.3d 217, 222 (Del. 2011) (new trial granted where parties did not learn that seated juror was the victim of a crime being prosecuted by the Attorney General's Office, noting that "[w]ith no questions on the record directed to Juror No. 8's ability to be impartial despite his experience, we find that Juror No. 8, a victim in a pending criminal trial, lacked the capacity to render a fair and impartial verdict in the Knox trial").

335. **Albert Musgrove, Juror No. 50.** It is clear that prospective juror Albert Musgrove, struck with a peremptory challenge by the defense, had unique views about the death penalty that strongly favored the prosecution, although for unexplained reasons he failed to answer questions concerning his feelings about the death penalty and the purpose it serves in society on his questionnaire. *See* Q. 89-90. When questioned by the prosecutor, he likened the death penalty to euthanizing animals, a procedure to which he had become inured by virtue of his job as an animal control officer for the City of Killeen.[40] 15.RR.119-20. He also questioned why society should go to the expense of keeping a guilty person alive rather than killing them:

> I believe that if a person is guilty why should we house and feed this person. I mean, life is not free, I mean, somebody has to care for you, somebody has to watch you. If the crime is severe enough to warrant the death penalty, I think that

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A1009.

[40] *See* Questionnaire, Q. 7.

> as a taxpayer, the person that's going to end up a portion of my taxes to support this person that's incarcerated that, yeah. I mean – do you understand what I'm trying to say?

15.RR.120-21. *See also* 15.RR.121-22 (the death penalty "is the same thing" as euthanizing animals who are killed "[j]ust because we don't' have room for them").

336. Later, Musgrove told defense counsel that he believed a person convicted of capital murder who presents a continuing danger should get the death penalty: "If – if – if the facts warrant death penalty, if the facts says that the person has met those criterias for death, then he may be a threat to society, then yes, sir." 15.RR.124-25. As he further explained:

> I believe that if it was planned, you know, that person put a thought into it and that would probably definitely warrant the death penalty, if it was something that may have inadvertently happened for some reason, then the sentence may be less. * * * I think if I were to defend my – one of my siblings or something like that, and by doing so resulted in a death of someone, I would hope that the – even though it may be a death penalty type of thing, that they would understand that it's not like a crime of passion, but I was in the process of trying to defend someone I cared about.

15.RR.125-26. After defense counsel told him that someone acting in defense of self or others would not be guilty of murder, Musgrove stated that he felt the death penalty should be imposed if it wasn't self-defense and the defendant had no motive:

> A. [I]f it's not self-defense, then what I'm thinking now is why did you commit this – this act?
>
> Q. Sometimes people just murder other people.
>
> A. And in that case if there's no motive, no reason for you to do it other than that, hey, I felt like I'm going to kill someone today, then yes, sir, I believe you should be – and if the death penalty was there, then you should also be put to death.

15.RR.128. Musgrove stated, however, that he would consider the questions at the sentencing phase. 15.RR.129. He explained he could not yet say if this person would be a future danger and would have to listen to both sides. In answering defense counsel's question about whether

he would base his decision on his taxpayer status, Musgrove returned again to his belief that someone acting in self-defense should not be executed:

> Q. There are some people that say, well, I'm not going to pay and house somebody for the rest of their life because, you know, why not – I mean what good does it do you to have to spend the rest of their life in prison. Just kill them.
>
> A. I can't give you an answer to that one except that, you know, like I said earlier, there's even though it may be a capital case, if there was – like, okay, was defending this person here and somehow accidentally I ended up killing this person. Then, okay, I could say, okay, I understand. And during the sentencing phase, if – if – if asked I could – I could make – I could – how the best way to say it – I could vote to say okay, let's – let's put – let's sentence this person to jail for life.
>
> Q. I mean apart from an accident or mistake, can you think of any other situations?
>
> A. No, sir, I can't. And actually if – if a person had actually planned it, then – and – and he was convicted and based on that conviction and when they go through the judgment phase and prove that this person actually planned it, then I wouldn't have any problem voting for the death penalty for that.
>
> Q. Okay.
>
> MR. DONAHUE: Can I have just a moment, Judge.

15:RR.132-33.

337. Defense counsel at this juncture challenged Musgrove for cause, arguing that "apart from accident and mistake, which once we get beyond the guilt/innocence phase of the trial, you know, we can't get there." 15.RR.133. The court asked for the prosecutor's position, but interrupted the response before the prosecutor could make an argument, stating: "The Court doesn't find sufficient reason *at this point* to grant a challenge for cause." *Id.* (emphasis added). The prosecutor advised: "Right. That's – he's got to be told here is what the law is, can you follow the law." 15.RR.133-34.

338. Although the prosecutor had provided defense counsel a blueprint for further questioning to ascertain whether Musgrove's opinions about the death penalty would prevent

him from following the law, defense counsel stated he had "[n]o further questions." 15.RR.134. The defense later expended a peremptory challenge to remove this juror, without learning whether he was excusable for cause.

339. **Dale Motl, Juror No. 30.** Prospective Juror Dale Motl wrote on his questionnaire that he was in favor of capital punishment except in a few cases where it would not be appropriate and believed the death penalty was appropriate "for cases in which there is no provocation for the defendants actions," but noted he did "have a problem with it if self defense is an issue." Questionnaire, Q. 92, 89. As he explained during questioning by the prosecutor about the 5-99 year sentencing range for noncapital murder:

> You know, if I was to elaborate and this is just my way of thinking here, if someone was to walk in this room and pull out a gun and shoot someone, yeah, I'd have a real tough time with that. I mean, boy, that's blatant, that's in your face, here it is.
>
> And I fall back on self-defense. I do know that there are times you can push a person into a corner with no avenue for him to take unless it's just to defend himself. And in that instance, then I do have a problem with hey, look, it wasn't something that was premeditated. It was a situation that the person was forced into. He had no recourse. He may have tried to exit the room and been cut off and now he is forced into a situation where he has to make a choice in a split second.

13.RR.203-04. Motl also told the prosecutor that the defendant would have the burden of proving his innocence: "I would have to be totally convinced in his innocence to let him go or totally convinced in his guilt to give him the death sentence." 13.RR.200.

340. Defense counsel asked the juror whether he was stubborn due to his Lutheran/Germanic heritage and would stick to his opinions once formed, 13.RR.213-14; about his interests in law enforcement and motorcycles, 13.RR.214-16; whether a smaller man lashing out at a bigger man may be justified in causing a death, 13.RR.216-17, and whether he had "any knowledge . . . with mental illness or mental de-stress [sic], mental deficient or for

that matter mental retardation," 13.RR.217. Counsel touched on the juror's questionnaire answer that the death penalty was appropriate when there was no provocation, but asked no questions about how the juror's opinion about lack of provocation would impact his capital sentencing decision. 13.RR.223-24. When the prosecutor successfully objected to one of defense counsel's leading questions about whether the juror would find it mitigating if someone had not lived the American Dream, defense counsel ended his questions. 13.RR.228. Counsel did so without learning anything about how the juror's strong beliefs in favor of the death penalty would impact his sentencing decision or whether he could accord Mr. Tabler the presumption of innocence, as he was required to do, despite his stated position that he "would have to be totally convinced in his innocence to let him go or totally convinced in his guilt to give him the death sentence." 13.RR.200.

341. Although Musgrove was eventually excused by a defense peremptory challenge, proper questioning of the juror would likely have resulted in his removal for cause and afforded the defense an enhanced ability to select a fair and impartial jury.

342. "[V]oir dire is an integral part of defense counsel's role in providing adequate legal assistance because it allows counsel to intelligently exercise peremptory challenges and challenges for cause during the jury selection process." *Dinkins v. State*, 894 S.W.2d 330, 344 (Tex. Crim. App. 1995). Here, counsel's failure to engage in meaningful questioning of numerous prospective jurors to follow up on answers that indicated their likely inability to serve as fair and impartial jurors resulted in the seating of incompetent jurors and defense counsel's squandering of peremptory challenges on individuals who were removable for cause. The inadequate questioning further rendered their use of peremptory challenges unintelligent and arbitrary. "Given the fundamental nature of the impartial jury and the consistent line of

Supreme Court precedent enforcing it," this Court "must conclude that 'the result of [Petitioner's trial] is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.'" *Virgil v. Dretke*, 446 F.3d 598, 613 (5th Cir. 2006) (counsel ineffective in failing to remove two biased jurors).

b. Counsel Failed To Conduct Any Voir Dire Examination Of Numerous Prospective Jurors.

343. During voir dire, the parties agreed to excuse over forty prospective jurors without even bothering to questioning them, on the basis of their answers to a written jury questionnaire. *See* 14.RR.98-99; 15:106-08; 16.RR.86-87, 134-35; 17.RR.36, 114. This procedure violated Mr. Tabler's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and trial counsel were accordingly ineffective in acquiescing to this procedure. The statute permitting excusals based on agreements between the parties is unconstitutional as applied in this case. Appellate counsel was ineffective for failing to raise these meritorious claims in post-sentence motions and on appeal.

i. The Legal Standard.

344. The Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. Part of the guaranty of this right "is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 730 (1992). *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), established that the Sixth Amendment right to an impartial jury is violated when a jury is empaneled that is "uncommonly willing to condemn a man to die." *Id.* at 521. The jury is improperly empaneled when one or more jurors are excluded merely because of their general moral or philosophical reservations about the death penalty. *Id.* at 522. If even a single juror is improperly excluded under *Witherspoon*, "any subsequently

imposed death penalty cannot stand." *Davis v. Georgia*, 429 U.S. 122, 122 (1976) (*per curiam*). *Accord Gray v. Mississippi*, 481 U.S. 648 (1987).

345. "The State may bar from jury service [only] those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths." *Adams v. Texas*, 448 U.S. 38, 51 (1980). To exclude a juror because of his or her beliefs about the death penalty, the State must prove that "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Uttecht v. Brown*, 551 U.S. 1, 7 (2007) (quoting *Adams*, 448 U.S. at 45). The mere acknowledgment of scruples against the death penalty does not satisfy this test. Even plainly expressed opposition to (or discomfort with) the imposition of a death sentence is not enough to disqualify a person from serving as a capital juror, for one "who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Witherspoon*, 391 U.S. at 519.

346. The burden of proving partiality rests on the party seeking to excuse the venireperson for cause. *Witt*, 469 U.S. at 423. The touchstone of partiality is a demeanor assessment in open court. No written, multiple-choice questionnaire can substitute for individual examination when the inquiry is into state of mind.[41] It violates the Sixth Amendment for a court to exclude jurors for their views on the death penalty on the basis of a written questionnaire alone, without conducting individual voir dire. Mechanically culling venirepersons for expressions about the death penalty – without establishing that the views

[41] As the Court observed in *Uttecht v. Brown*, 551 U.S. 1, 9 (2007), in explaining the deferential standard of review applied to review a trial court's cause challenge rulings, "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (citing *Witt*, 429 U.S., at 428; *Darden v. Wainwright,* 477 U.S. 168, 178 (1986)).

underlying those expressions make the venirepersons partial – creates a jury "uncommonly willing to condemn a man to die" and violates the right to an impartial jury. *Witherspoon*, 391 U.S. at 521. "The question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind . . . based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 469 U.S. at 428. Moreover, because jurors are vested with greater discretion in capital cases, the examination of prospective jurors must be more careful than in non-capital cases. *See, e.g.*, *Turner v. Murray*, 476 U.S. 28, 35-36 (1986).

ii. Defense Counsel Abdicated Their Responsibility To Ensure The Selection Of A Fair And Impartial Jury By Agreeing To The Removal Of Jurors Whose Questionnaire Responses Did Not Establish That They Were Removable For Cause.

347. In this case, the parties agreed – without input from the trial judge – to excuse over forty venirepersons on the basis of their questionnaires alone. There was no opportunity for counsel or the trial court to assess the venirepersons' demeanor or credibility before they were disqualified, or to explore the meaning of their questionnaire responses. Moreover, several of the prospective jurors "excused by agreement" were clearly not challengeable for cause based on their answers to the questionnaire alone. For example, Juror No. 51, Jennifer Claypool's questionnaire revealed her to be a thoughtful individual whose position on the death penalty was not disqualifying. *See* Questionnaire. She was not inalterably opposed for the death penalty; rather, she believed there are cases where it is appropriate, Q. 92, 93; and indicated she would "want to hear all the facts and help determine if he deserves the death penalty or take his life away in life imprisonment." Q.94. None of her remaining questionnaire responses provided any basis to believe she was unqualified to serve.

348. Linda Ortiz, Juror No. 62, was middle of the road with respect to the death penalty, indicating she was "neither generally opposed nor generally in favor of capital punishment" and "would consider all of the penalties provided by law and the facts and circumstances of the particular case." Q. 92, 93. She explained that "[i]f the person who is being prosecuted had the intention of death the entire time, then it is only fair to think about the death penalty," and believed that capital punishment "makes criminal think whose life is more important? Mine or theirs." Q. 89, 90. Nothing in her questionnaire responses provided any basis for finding her unfit to serve in the case.

349. Prospective juror no. 72, Marcus Magana, also wrote that he was "neither generally opposed nor generally in favor of capital punishment" and "would consider all of the penalties provided by law and the facts and circumstances of the particular case." Q. 92, 93. He explained that he had never given the death penalty any thought, but guessed he "would need facts, if a person willingly kills someone that they deserve to be punished," and that the purpose of capital punishment was "punishment" and assuring "the victims family & friend . . . that this person will never harm anyone again." Q. 89, 90. None of his other questionnaire responses, on their own, provided any basis to remove him for cause.

350. Prospective juror no. 76, Trita Long, was opposed to capital punishment except in a few cases where it was appropriate, and could consider all the penalties provided by law. Q. 92, 93. She explained that she initially she thought she would not be comfortable with the death penalty but "[a]fter lunch I realized that it wasn't about right or wrong in my opinion it was to serve justice." Q. 89. Its purpose, she felt, was "ridding the world of hazardous human beings that aren't fit for society." Q. 90. She also observed that "sometimes the punishments are not sever enough & leave room for the criminal to slack." Q. 74. Although her younger

brother was serving a six-month juvenile disposition for assault, Q. 37, this was a basis to engage in further questioning, not to dismiss her out of hand. Nonetheless, this juror was dismissed by agreement without any voir dire at all.

c. Defense Counsel Made No Effort To Rehabilitate Prospective Juror Wayne Bickham And Instead Allowed Him To Be Excused On The Basis Of Confusion About The Significance Of Parole Eligibility Without Asking Him A Single Question.

351. Defense counsel also provided ineffective representation in agreeing to excuse prospective juror no. 70, Wayne Bickham, after the prosecutor had questioned him, without asking Bickham a single question. *See* 16.RR.134. Bickham believed the death penalty "to be appropriate," as it "prevents the reoccurrence by same person and deters others," Q. 89, 90, and indicated that he was neither generally opposed nor generally in favor of the death penalty, would consider all sentencing options and felt competent to serve on the jury. Q. 92, 93, 94. He reiterated these views when questioned by the prosecutor, testifying that he believed that "circumstances exist for both penalties," 16.RR.123; that having killed once, "it would be easier for someone to do the same thing a second time," and that that believe would influence him to a degree at sentencing, 16.RR.124-25. He explained that the severity of the crime would be significant in determining punishment: "If someone committed capital murder as part of an altercation, he might be a candidate for life in prison. If someone got upon top of the tower down at UT and shot a bunch of people that would be perhaps an instance for the death penalty." 16.RR.130.

352. Bickham got hung up on questioning about his views about a life sentence inasmuch as life without parole was not an option in this case. Although Bickham stated that the difference between life without parole and life with parole was not important to him because by the time the defendant could get out 40 years later "it's hard to imagine somebody

being a threat to society at that point," 16.RR.129, this belief was hardly disqualifying. He expressed confusion about whether he could answer the future dangerousness question without considering whether the defendant should be a candidate for parole in the future. 16.RR.132-33. Although Bickham's honest confusion about this issue *required* further questioning to determine whether he could follow the law on this point, defense counsel declined to ask a single question and the court proceeded to excuse him. 16.RR.134. "Concerns that stem from misinformation and confusion concerning the law or process are ripe for discussion and redress through rehabilitation." *Matarranz v. State*, 133 So. 3d 473, 486 (Fla. 2013). *See, e.g.*, *Cardenas v. State*, 325 S.W.3d 179, 187 (Tex. Crim. App. 2010) (explaining that where a juror has indicated she has a disqualifying bias, "[t]he judge or the opposing party could explain the law further in the hope of having the juror reconsider his position, but absent such rehabilitation, that juror is subject to a challenge for cause"); *Heiselbetz v. State*, 906 S.W.2d 500, 510-11 (Tex. Crim. App. 1995) (denial of cause challenges not abuse of discretion as to prospective jurors who were rehabilitated after law was explained to them"); *Rougeau v. State*, 651 S.W.2d 739, 741 (Tex. Crim. App. 1982) (court reversibly erred in "refus[ing] to allow counsel to examine [juror] further in order to rehabilitate her when she had not clearly excluded herself").

353. Bickham gave every indication that he would be a thoughtful and dispassionate juror; in his words, he "would do [his] best to do a fair and honest job and [was] probably one of the least prejudiced people here because I never heard of this." 16.RR.132-33. In failing to engage Bickham in questioning, defense counsel abdicated their duty to ensure that a fair and impartial jury was seated.

d. The Jury Selection Procedures in This Case Failed to Protect Mr. Tabler's Constitutional Rights.

354. Because defense counsel agreed to the removal of these jurors in particular – who simply were not excusable on the basis of their death penalty views and revealed no other disqualifying views in their questionnaire responses – the State was not held to its burden under *Witt* to prove partiality. The trial court erred in permitting these and numerous other jurors to be excused without individual voir dire. *See, e.g.*, *United States v. Chanthadara*, 230 F.3d 1237, 1270-73 (10th Cir. 2000) (death sentence reversed due to court's error in excusing juror by agreement where questionnaire responses did not establish that she was unqualified to serve under *Witt* and observing that "[w]here the court finds that even one juror was improperly excluded, the defendant is entitled to a new sentencing, because the right to an impartial adjudication is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'") (quoting *Fuller v. Johnson*, 114 F.3d 191, 500 (5th Cir. 1997) (quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)).

355. Texas law permits excusals by consent between the parties. *See* Tex. Code Crim. Proc. art. 35.05. That statute is unconstitutional as applied in this case. The large number of jurors excused by consent deprived Mr. Tabler of a meaningful opportunity to assess the demeanor, credibility, and partiality of the venire, and resulted in the excusal of numerous jurors who expressed general moral or philosophical reservations about the death penalty, but who were not demonstrably "partial" under *Witt*.

356. The jurors identified above, and others, each indicated in their questionnaire responses that they were willing to give meaningful consideration to both the death penalty and life in prison based on the facts of each specific case. Their questionnaire responses

accordingly did *not* show that they would be impaired in the performance of their duties and the jurors should have been subjected to individual voir dire as required by *Witherspoon* and its progeny. Defense counsel's failure to do so removed from the prosecution the burden of establishing that each of these jurors' death penalty views would prevent or substantially impair their ability to follow the law and had the effect of handing to the prosecution additional peremptory challenges to which the State was not entitled. The process of excusing jurors by agreement, most especially those whose answers showed them to be presumptively competent jurors, meant that counsel was abdicating their responsibility "to further question the prospective jurors to discover if there [is] actual bias that could form the basis of a challenge for cause and to intelligently exercise [the defendant's] right to peremptory challenges." *Walker v. State*, 195 S.W.3d 250, 257 (Tex. Crim. App. 2006). On this basis as well, defense counsel provided constitutionally inadequate representation.

2. Defense Counsel Failed To Object To Misstatements Of The Law Made By The Prosecutor And The Trial Court.

357. Throughout the voir dire, the prosecutor, and at times the trial court, misled jurors regarding the legal standards that applied in this case and defense counsel failed to object – or even to correct the misstatements of law. For obvious reasons, it "is error for the State to present a statement of law that is contrary to that presented in the charge to the jury." *Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990). Likewise, a trial court has the constitutional obligation to properly instruct the jury in the law. *See, e.g.*, *Carter v. Kentucky*, 450 U.S. 288, 303 (1981) ("A trial judge has a powerful tool at his disposal to protect the constitutional privilege – the jury instruction – and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment.").

358. Counsel's failure to object to misstatements of law was deficient and prejudiced Mr. Tabler's substantial rights to a fair and impartial jury, and to a reliable determination of his punishment. *See, e.g. Valencia v. State*, 966 S.W.2d 188, 190 (Tex. Ct. App.1998) (petition for discretionary review refused) (counsel provided ineffective representation in failing to object to prosecutor's legally erroneous statements).

a. The Prosecutor Repeatedly Told Prospective Jurors That All Twelve Chosen Jurors Had To Agree That Mitigating Circumstances Existed And That They Warranted A Life Sentence, In Direct Contravention Of Both Texas Statutory Law And The Eighth Amendment To The United States Constitution.

359. Texas law does not require jurors to be unanimous in finding that mitigating circumstances warrant imposition of a life sentence. Rather, under the Texas capital sentencing statute, jurors are instructed that, should they find that the defendant will be a continuing danger, they must determine whether, considering all the evidence "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment . . . rather than a death sentence shall be imposed." Tex. Code Crim. Proc. art. 37.071(e)(1). Jurors are further instructed that the jury:

> (1) shall answer the issue 'yes' or 'no';
>
> (2) may not answer the issue 'no' unless it agrees unanimously and may not answer the issue 'yes' unless 10 or more jurors agree;
>
> (3) need not agree on what particular evidence supports an affirmative finding on the issue; and
>
> (4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

Tex. Code Crim. Proc. art. 37.071(f).

360. During voir dire, the prosecutor repeatedly advised jurors that a capital jury must unanimously agree that mitigating circumstances exist and that those circumstances

warrant imposition of a life sentence. Despite the fact that prior to trial counsel had filed a motion challenging the constitutionality of this rule, *see, e.g.*, CR:73-80, on the grounds that it risked the arbitrary imposition of the death penalty,[42] defense counsel sat mute as the prosecutor told numerous prospective jurors, some of whom ultimately sat on Mr. Tabler's jury, that they were required to unanimously answer the question in the affirmative on the basis of unanimous findings of mitigating evidence.

361. Marvin Selman, selected as Juror No. 2, was told by the prosecutor:

> If the jury finds mitigating circumstances, then the question is going to be are they sufficient. And the jury doesn't have to agree on mitigating circumstances. You know, six jurors might say, in a particular case, well, you know, this is a pretty young person. You know, they're really not old enough to understand the nature

[42] Article 37.071 bars the jury from being told that if the jury is unable to reach a unanimous or at-least-ten verdict on either of the special issues, the trial court is required to sentence the defendant to life in prison. *See* Tex. Code Crim. Proc. art. 37.071 Sec. 2(a) (barring instruction on the effect of a failure to agree); Sec. 2(g) (life sentence required if jury is unable to agree).

The so-called "10-2 Rule" and the confusing instructions it requires create a farcical scenario in which the opposite of "unanimous" is "ten people agree." Clearly, deliberations in a jury room on a death sentence could reach multiple outcomes that fall into neither category: a vote of 9-3, 8-4, 7-5, and so on. However, juries are given no instruction on how to proceed if that likely scenario plays out. The statute and instructions create an unconstitutional risk of arbitrary and unreliable capital sentencing in violation of the Eighth Amendment. They also create an unconstitutional risk of jury coercion, wherein the jurors perceive that they must reach a certain result. *See Jenkins v. United States*, 380 U.S. 445, 446 (1965). The instructions are also inconsistent with *Wiggins*, which held that a death sentence cannot stand if one single juror strikes a different balance in weighing the mitigating circumstances. *Wiggins v. Smith*, 529 U.S. 510, 537 (2003). That portion of the jury instruction suggesting that it requires the agreement of 10 out of 12 jurors to find "no" on the first special issue and to find "yes" on special issue two, unconstitutionally diminishes each juror's individual sense of responsibility in the sentencing process in violation of the Eighth Amendment. The plain language of the statute creates the impression that one juror's dissent from the remaining members of the jury, without the agreement of at least one other juror, would be insufficient to make a difference in the determination of either of these special issues or the ultimate sentence the jury imposes. For this reason, this instruction is also a violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Moreover, by actively misleading potential holdout jurors to believe their individual votes will not change the outcome, the jury instruction injects arbitrariness and unfairness into the penalty phase, in violation of Petitioner's due process rights.

> and consequences of their acts. Other people might – six other[s] might say well – or you know, he was mistreated as a child, and that helped him not understand the consequences of his acts. And although they don't agree, they all agree that those are mitigating circumstances.
>
> Then they have got to determine are they sufficient to warrant that he gets life instead of death.

12.RR.54-55. Seated Juror No. 10, James Morris, was told that "they don't have to agree on the same mitigating circumstances. They have to agree that mitigating circumstances exist." Likewise, John Gauntt, selected as Juror No. 11, was told: "[W]e know we talked about unanimous jurors, this is one instance where everybody doesn't have to agree on the same mitigating circumstances. They just have to agree that there are mitigating circumstances. That is sufficient."

362. These were not isolated instances. Rather, prosecutors peppered the voir dire with such erroneous statements. *See, e.g.*, 12.RR.89-90 ("[S]ix jurors might think that youth is a mitigating circumstance, as to a particular case. Six others might think that something else is a mitigating circumstance. They all have to agree that there are mitigating circumstances."); 13.RR.244 ("The jurors don't have to agree as to particular mitigating circumstances. They just have to agree that they exist. And that they are sufficient to overcome I guess the bad stuff. That those extenuating circumstances as applied to this particular crime are sufficient in the jurors' mind that he should get a life sentence instead of a death penalty."); 14.RR.66-67 ("[A]ll have to agree that there are mitigating circumstances that are sufficient so that he gets life"); 15.RR.32 ("And the jurors don't have to agree on what is mitigating. They just have to determine that there are mitigating circumstances."); 17.RR.54 ("When they get to ultimately answering the question, they have to agree that those mitigating circumstances exist."); 18.RR.190-91 ("Jurors don't have to agree as to what specifically is a mitigating circumstance. They all have to agree that they exist and they all have to agree that they're sufficient but they

don't have to be the same thing."); 19.RR.19-20 ("And the jurors don't have to agree as to the same mitigating circumstance . . . . That's okay. They all have to agree that they exist but they can differ as to what they are."); 19.RR.52 ("And the jurors don't have to agree on the individual circumstances. They do have to agree that they exist. Six jurors could believe that one mitigating circumstance is here, six others would believe that another one is there. It's only important that all of them agree that there are mitigating circumstances."); 20.RR.82 ("The important thing to remember is you don't have to agree on the bottom line mitigating circumstances. . . . So, if everybody writes down and they pass them all to the foreperson of the jury. And the – they say, well, everybody has written down a different mitigating circumstance. We have 12 different mitigating circumstances. That's okay. * * * As long as they all agree that there are mitigating circumstances and they all agree that whatever the mitigating circumstances, are, are sufficient.").

363. The prosecutor's statements were in direct conflict with Texas law, which does not require unanimity with respect to jurors' response to the mitigation special issue. Rather, under the 10-2 Rule that defense counsel had challenged, only ten jurors had to agree that the mitigating evidence warranted imposition of a life sentence. Despite this blatant error, however, defense counsel did not lodge a single objection. Instead, apparently, they adopted the prosecutor's erroneous interpretation of the law, themselves telling at least one prospective juror Octavia Elmore, that unanimity was required:

> [I]f you felt that yes, it was a mitigating circumstance, you don't have to agree. The 12 people and when it comes to this question, there doesn't have to be a consensus about what the mitigating circumstance is? * * * The only consensus is that there has to be some mitigating circumstance and 12 people can have 12 different opinions about what it is, that the consensus to say yes is sufficient."

18.RR.149. Thus, despite challenging the "10-2 rule," counsel had no understanding of what the rule meant.

364. There can be no reasonable explanation for counsel's failure to object. Instead, it appears the product of counsel's "startling ignorance of the law." *Kimmelman v.* Morrison, 477 U.S. 365, 385 (1986). Of course, "[t]actical or strategic decisions based on a misunderstanding of the law are unreasonable." *Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008) (citing *Hardwick v. Crosby*, 320 F.3d 1158, 1163 (11th Cir. 2003); *see, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395 (2000) ("[Counsel] failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records."); *Morrison*, 477 U.S., at 385 (1986) ("Counsel's failure to request discovery . . . was not based on 'strategy,' but on counsel's mistaken beliefs . . . .").

365. Counsel's deficient performance in failing to object to this blatantly improper interpretation of the law, moreover, created a substantial risk that jurors failed to properly apply Texas law in assessing mitigation at sentencing (at least three jurors were given this erroneous interpretation), in violation of both the Texas sentencing statute and the Eighth Amendment to the United States Constitution. Texas law specifically allows the return of a proper sentencing verdict when ten of twelve jurors agree to that life imprisonment is the proper punishment, but members of the jury were instructed they had to be unanimous in this finding in language far more understandable than the instructions actually provided at the close of evidence. *See* 29.RR.13. As such, the improper legal definition provided by the prosecutor created an unacceptable risk that one or more jurors were precluded from giving full effect to the mitigating evidence they heard and voting in accordance with their beliefs about punishment.

b. The Prosecutor Repeatedly Promoted Standardless Decisionmaking By Telling Jurors That It Was Entirely Up To Them To Determine The Meaning Of The Special Questions And, Rather Than Objecting And Correcting This Misinformation, Defense Counsel Promoted The Same Erroneous View.

366. A death penalty procedure can satisfy the Eighth Amendment only when it meets "two different aspects of the capital decision-making process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 970 (1994). First, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (citation omitted). To do so, the circumstance making the crime death-eligible "may not apply to every defendant convicted of a murder" and "may not be unconstitutionally vague." *Tuilaepa*, 512 U.S., at 972. At the selection phase, the sentencer must "consider relevant mitigating evidence of the character and record of the defendant and the circumstance of the crime"; it "requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability." *Id.* at 972-73 (citations omitted). Such evidence must be given meaningful consideration by the sentence:

> "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value.'" [*McKoy v North Carolina*, 494 U.S. 433, 440-41 (1990).] Thus, a State cannot bar "the consideration of . . . evidence if the sentence could reasonably find that it warrants a sentence less than death." 494 U.S., at 441 . . . . Once this low threshold for relevance is met, "the Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence.

Tennard v. Dretke, 542 U.S. 274, 285 (2004).

367. The parties threw these fundamental sentencing requirements out the window by repeatedly advising prospective jurors (some of whom were ultimately selected) that they would receive no definitions and it fell to them to decide how to define the special issues.

368. Prospective jurors, including several who ultimately served on the jury, were repeatedly told that it was entirely up to them to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" as no one would define the terms of that question for them. This was often done by defense counsel. As defense counsel told seated juror James Morris:

> You know, if I knock you over and steal your wallet, that might be considered a criminal act of violence. But does that make me a continuing threat to society that you need to say yes to this question? * * * Some folks may say that may not be a continuing threat to society. Some people might. * * * Well, you know, I said that's up to you to decide because nobody is going to give you a definition of this * * * probability or criminal acts of violence, or a continuing threat to society.

18.RR.82-82. *See also, e.g.*, 14.RR.82 (defense counsel advising that "nobody is going to tell you what any of these words mean. Nobody tells you what criminal act of violence is. And nobody is going to tell you what threats of society, continuing threat to society is. You, one of 12 people may have to make that decision on your own."); 15.RR.93 (defense counsel telling seated juror Joseph George that "[n]obody is going to define anything for you. They've worded these two questions where it's simply a line that says yes or no. . . . Nobody is going to tell you . . . what probability means. Nobody is going to tell you what criminal acts of violence means. Nobody is going to tell you what constitutes a continuing threat. That's up to you . . . ."); 15.RR.167 (defense counsel advising seated juror Laticia Rudd that "[t]here's nobody, nobody, not the judge, not me, not the prosecutor, nobody is going to tell you what that means. Nobody is going to tell you what this criminal acts of violence means. And nobody is going to tell you what continuing threat to society means. It's kind of for you to decide.").

369. The words of the statute, Tex. C. Crim. Pro. art. 37.071(2)(b)(1), however, have "a common-sense core of meaning" and jurors are not free to disregard that meaning to find the elements of the continuing threat issue satisfied simply on a whim. *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring). *See, e.g.*, *See Milton v. Procunier*, 744 F.2d 1091, 1095-96 (5th Cir. 1984) ("deliberately," "probability," and "criminal acts of violence" "have a plain meaning of sufficient content that the discretion left to the jury" is "no more than that inherent in the jury system itself"); *Nethery v. Collins*, 993 F.2d 1154, 1162 (5th Cir. 1993) (not necessary to define "deliberately," "probability," or "society"). While it is true that the jury would not receive instructions from the court regarding the meaning of the terms, defense counsel nonetheless had an "overarching duty to advocate the defendant's cause,"[43] a duty they abdicated by failing to instruct jurors that the special issue was to be narrowly applied to ensure that the death penalty was reserved only for the worst offenders. Instead, in telling jurors over and over that they would not be cabined by the statutory and instructional language, counsel did the opposite, promoting the arbitrary and capricious infliction of the death penalty, in violation of the Eighth Amendment's command that the sentencer's discretion be adequately guided in determining penalty. *See, e.g.*, *Blystone v. Pennsyvania*, 494 U.S. 299, 314 (1990) (citing cases).

370. Counsel similarly fell short in failing to object, and actively endorsing, the prosecutor's constant instruction to jurors that it was entirely up to them to determine whether evidence was mitigating. The prosecutor told Eli Seda Lopez, ultimately selected as a juror, that "it's up to each juror to determine, first of all, whether a particular circumstance, bits of evidence is mitigating or not. If the jury doesn't find any mitigating circumstances, then they

[43] *United States v. Batamula*, 788 F.3d 166, 172 (5th Cir. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

answer the question no." 13.RR.171.[44] Rather than object to the prosecutor's mischaracterization of mitigation, defense counsel chimed in, later telling Juror Lopez:

> I mean if you believe the answer to this question was yes that there was something there and you believe that in your heart and your mind because nobody is going to tell you, nobody tells you what it mitigating. Nobody – there's no – it's kind of an essay test versus a Scranton. There's no multiple choice. You kind of get to write your own answer in.

13.RR.193. *See also* 13.RR.30 (defense counsel telling seated juror Vicki Lidey that "[n]obody is going to tell you what is or what is not a mitigating circumstance.").

c. The Prosecutor Told The Jurors That Mitigation Must Have A Nexus To The Crime.

371. Defense counsel did not object when the prosecutor incorrectly and in violation of *Tennard v. Dretke*, 542 U.S. 274, 285 (2004), expressly told jurors that mitigating evidence had a causal nexus to the offense. *See, e.g.*, 13.RR.143 ("If you look at it and see, well, I think there may be some mental illness here, but I don't believe that the mental illness had anything to do with the crime after I've looked at all the evidence. So, I'm not even sure if it's a mitigating circumstance."); 17.RR.22 (prosecutor instructing that "sometimes behavioral problems on the one hand, there might be some mitigating circumstances given one individual, where same behavior in another individual there are no mitigating circumstances. * * * [Y]ou've got to look at the big picture and see, *wait a minute, I thought what was driving this behavior was it their problem which we all agree they may have, but is that really what caused this behavior*?") (emphasis added). Such comments foreshadowed the prosecutor's improper

[44] *See also* 18.RR.21 (prosecutor telling seated juror "[y]ou're not going to get a list of these are mitigating circumstances and these are not. You know we have conversations with a big group about mental retardation is clearly a mitigating circumstance. There are other potential mitigating circumstances that jurors really don't have to agree on.").

penalty phase argument, in which he argued that none of the evidence Mr. Tabler presented at trial was "mitigating" because it had no causal relationship to the crime. *See* Claim II.H.

372. "T]he Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Tennard*, 542 U.S., at 285 (citing *Boyde v. California*, 494 U.S. 370, 377-378 (1990) (internal citations omitted). "Just as the State may not by statute preclude the sentence from considering any mitigating factor, neither may the sentence refuse to consider, *as a matter of law*, any relevant mitigating evidence. *Eddings v. Oklahoma*, 455U.S. 104, 115 (1982). *See also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 250 (2007) (court may not "exclude" mitigation by "exclu[ding it] from meaningful consideration by the jury"). Yet, by telling jurors that they it was entirely up to them to determine what was mitigating, jurors were in essence given free rein to simply ignore the mitigating evidence presented at trial, even though such evidence constituted relevant mitigating evidence they were required to consider. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30 (2009) (counsel ineffective in failing to present mitigating evidence of defendant's mental difficulties and abusive childhood); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (reversing on grounds that Texas special issues unconstitutionaly precluded jury from full consideration of evidence of childhood abuse and mental retardation); *Park v. Dugger*, 498 U.S. 308, 314 (1991) (error to refuse to consider evidence of "a difficult childhood, including an abusive, alcoholic father"); *Eddings*, 455 U.S., at 115 (error not to consider evidence "of a difficult family history and of emotional disturbance").

373. "The sentencers . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 115. In failing to inquire about the juror's ability to give

meaningful consideration to the mitigating evidence they intended to present and encouraging jurors to do the opposite by underscoring, incorrectly, that jurors were individually free to ignore such evidence, counsel provided ineffective representation that profoundly impacted the trial by preventing informed decisionmaking at jury selection, impeding the seated juror's consideration of mitigation; and creating fertile ground for the prosecutor's improper arguments about mitigation at sentencing. Sentencing relief is required.

d. The Prosecutor And Court Carelessly Informed Numerous Prospective Jurors That A Life Sentence In This Case Meant A 40-Year Prison Sentence.

374. Defense counsel failed to object when the prosecutor, and at times the court, advised prospective jurors that a life sentence meant forty years in jail, rather than forty-years before parole ineligibility. *See* Claim II.G *infra*. Such misinformation was extremely harmful as it created a false sentencing choice for jurors, particularly in light of the extraordinarily low possibility that Mr. Tabler would ever be released from prison. *See, e.g.*, *Simmons v. South Carolina*, 512 U.S. 154 (1994).

375. The prosecutor told Karen Lindburg, who was seated as a juror, that "[t]here's only two potential punishments. One of them is life in the penitentiary. And as Judge Trudo told you that means a mandatory 40 years, day-for-day. The other is the death penalty." 17.RR.17. Seated juror John Gauntt likewise heard from the prosecutor that "one question that lots of lay folks would say when looking at that is how are they going to be a threat to society if they're going to be in the penitentiary. * * * I you will be told – I think were told that life in this case means 40 years." 19.RR.72. The trial court told jurors the same – that a life sentence meant the defendant would be back in society in forty years:

> One of those [sentencing possibilities] is life and life in this circumstances because of the time frame in which this is alleged to have occurred means 40 years in the penitentiary as opposed to life without parole. The legislature didn't

> pass that until a later time after the occurrence of this event. So the possible punishments are life which means 40 years or the other option the jury will have is that of death."

15.RR.115. *See also* 11.RR.71-72 (court advising prospective juror that capital murder cases "can result [in] one of two punishments and that of either life in the prison which means the equivalent of 40 capital – 40 years to spend, or if the jury does not go and answer the questions in that vain [sic], then that leaves it up to whether or not to go to the death penalty"). (And, as with other forms of misinformation discussed above, defense counsel also repeated this error. *See, e.g.*, 19.RR.183-84.)

376. Counsel's numerous failings in voir dire[45] were inexcusable and costly. As a result of their failure to conduct an adequate voir dire examination of prospective jurors, counsel were unable to make intelligent use of cause and peremptory challenges with the result that likely biased jurors sat in judgment of their client. Because they failed to object to clear misstatements of law (and in fact joined in many of them), counsel's judgment about jurors' abilities to be fair were compromised and the jury that was ultimately selected was primed by

[45] Defense counsel on occasion were affirmatively insulting to prospective jurors. While questioning Marlin Selman, seated as Juror No. 2 on Mr. Tabler's jury, for instance, defense counsel expressed confusion about a questionnaire response in a manner that was crude and insensitive. Selman had written on his questionnaire that he had known someone with a serious drug problem, explaining that his "cousin in law got hooked on drugs while in Vietnam. Came back home & sold drugs to support his habit." Questionnaire, Q. 86. Defense counsel, however, misconstrued this statement to be that "[a] cousin involved, got hooked on drugs while in Vietnam and came back *homo*. Would that be another term for – I'm not sure, what does the word *homo* mean." 12.RR.64 (emphasis added). When the prosecutor interjected that the word was "home," not "homo," *id.*, defense counsel responded:

> I'm hoping that's what it says. As a Vietnam vet I didn't think I came back with any other – * * * Obviously, he didn't come back as a homo and I can now put that – * * * Well, as a veteran I kind of cringed myself there."

Id. Defense counsel, of course, had no idea whether Selman or someone close to him was homosexual and whether counsel's crude manner of speaking antagonized the juror. His comments were completely out of place.

misinformation to disregard relevant mitigating evidence while being given unbridled discretion to find that MR. Tabler would constitute a continuing threat, un cabined by the statutory and instructional language. On this basis alone, and in conjunction with counsel's numerous other deficiencies, Mr. Tabler's right to effective representation was denied.

B. Counsel Was Ineffective For Failing To Move For Suppression Of Petitioner's Statements On the Grounds That They Were Obtained Without Sufficient *Miranda* Warnings And Were The Product Of Coercive Police Questioning In Violation Of The Fifth, Sixth, And Fourteenth Amendments To The United States Constitution.

377. On the night of Mr. Tabler's arrest, Detectives Tim Steglich and Bob Clemons interrogated Mr. Tabler from approximately 9:15 p.m. until after 5:00 a.m. the next morning. During this time, Petitioner gave three statements explaining that Timothy Payne shot Amine Rahmouni and Haitham Zayed. Unsatisfied with Petitioner's statements, the detectives – at approximately 3:45 a.m. – stood a foot in front of Mr. Tabler and pressured him to "tell the truth." At this moment, Mr. Tabler, who was stammering and almost crying, told detectives that he was the shooter in the incidents on November 26th and 28th of 2004.

378. Petitioner's counsel litigated a pre-trial suppression motion, but limited his arguments to whether Mr. Tabler's statements were the product of an unlawful, warrantless arrest. 21.RR.75. Counsel ineffectively failed to raise the other and more valid reasons for suppression: that police obtained these statements through improper coercion and in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). Because the statements were inadmissible and, without them, a different outcome at trial or sentencing was reasonably probable, counsel's deficient advocacy deprived Mr. Tabler of the effective assistance of counsel.

1. Facts

a. The Confession

379. The events surrounding the taking of Mr. Tabler's statements are documented in a videotape from the Killeen Police Department, the Bell County Investigative Report, and an incomplete audiotape from the Bell County Sheriff's Office ("BCSO").

380. Shortly after the murders of Amine Rahmouni and Haitham Zayed, Detective Timothy Steglich with the BCSO identified Mr. Tabler as a prime suspect because Mr. Tabler had communicated with Mr. Rahmouni in the hours before the murder in order to sell him stolen stereo equipment. A116, 124, 126.

381. Through his investigation, Detective Steglich also learned that Petitioner was currently working as a confidential informant for Detective Clemons of the Killeen Police Department. A116. Mr. Tabler, who was facing charges of passing bad checks in Killeen, had agreed to facilitate drug sales and provide information in exchange for leniency on his outstanding charges.[46] A116.

382. Detective Steglich, believing that Mr. Tabler was responsible for the murders but lacking probable cause to arrest him, collaborated with Detective Clemons and designed a plan in which Detective Clemons would lure Mr. Tabler to the Killeen Police Department under the pretense that he wanted Mr. Tabler to execute an undercover drug purchase. 21.RR.32. Once Mr. Tabler arrived at the police department, Detective Clemons would arrest Mr. Tabler on the outstanding bad check offenses, thereby keeping Mr. Tabler in custody and

[46] Because Detective Clemons had worked with Mr. Tabler, he was well aware that Mr. Tabler was easily suggestible in a custodial setting. As explained by Dr. Brown, Mr. Tabler showed substantial impairment on the Gudjonsson Suggestibility Scale (GSS). A570.

providing the opportunity to question him about the murders and "gather information about his recent movements."[47] 21.RR.32; A117, 127, 135.

383. In accordance with the plan, Detective Clemons contacted Mr. Tabler on November 28, 2004, at approximately 7:30 p.m. and requested that he come in to the Killeen police department to work as an informant. 21.RR.34. Mr. Tabler complied with this request and arrived at the station around 9:00 p.m. *Id.*; *Video* (State's exhibit 114 at sentencing) at 1:18.

384. Before he arrived, Detective Gearhart of the BCSO set up video equipment to record Mr. Tabler's interactions with law enforcement. A179. Detectives Stinehour and Harlan from the BCSO remained in another room to listen to the conversation between Mr. Tabler and Detective Clemons. A127.

385. Mr. Tabler advised Detective Clemons that he had arranged to meet Mr. Chris Elston at a location close to Fort Hood to purchase cocaine and pills for the price of three hundred dollars and that Mr. Elston would be driving a white pick-up truck. 21.RR.18; *Video* at 2:00. Detective Clemons – waiting for word from Detective Steglich that he had obtained a warrant for Tabler's arrest on the theft charges – attempted to stall Mr. Tabler until he could effectuate the arrest. A127.

386. During this time, Detective Clemons asked Mr. Tabler whether he knew or had heard anything about the murders. *Video* at 2:37. He also asked him whether he knew who the "other guy" was (meaning Haitham Zayed), and why Mr. Tabler had stopped hanging out at Teazers and working for Amine Rahmouni. *Video* at 2:38; 4:07. Although Mr. Tabler denied knowledge of the shooting or the identity of the other victim, he admitted that he no longer

[47] As of November 28, 2004, Mr. Tabler had not been arrested on the check offenses.

went to Teazers because he had been kicked out, evidence that supported a motive for the murders. *Video* at 4:11-5:03; 24.RR.25.

387. A few minutes later, Detective Gearhart patted Mr. Tabler down under the pretext that he was about to place a recording device on his person but, instead, Detective Stinehour handcuffed him and advised him that he was under arrest for the theft charges. A178; Video at 14:04. Detective Clemons told Mr. Tabler that the D.A.'s office had requested this arrest because he had not fulfilled his obligation on the cooperation. *Video* at 14:34. At that moment, Mr. Tabler requested to speak with Detective Clemons alone and offered to tell him *something*. *Video* at 14:55. Before Mr. Tabler provided any information, Detective Clemons told Mr. Tabler that if "you could do something for me" he would "call 'Jacobs' right now."[48] *Video* at 15:10.

388. After this, Mr. Tabler told Clemons that he knew who killed Amine and if Clemons let him go, he would give him that information. *Video* at 15:30. Clemons told Mr. Tabler that he couldn't just release him, that Mr. Tabler "would *have* to give him something" because with a warrant lodged, Clemons "would have to call someone and get it revoked." *Video* at 15:37-15:47. Mr. Tabler reiterated that he could give information if Detective Clemons would let him go. *Video* at 15:48. Detective Clemons again told Mr. Tabler that he would have to have something concrete before releasing him. *Video* at 15:52. At that point, Mr. Tabler told Detective Clemons that Tim (Payne) "shot Amine twice in the head and his partner once." *Video* at 15:54. He also explained that Mr. Elston was driving Mr. Payne's truck. *Video* at 17:52. Detective Clemons continued to question Mr. Tabler on his relationship

[48] "Jacobs" refers to Raymond Jacobs, the D.A. investigator who had met with Mr. Tabler regarding the felony bad checks case earlier in November. A137.

with Tim and asked Mr. Tabler if he would be willing to wear a wire to obtain a confession from Tim. *Video* at 1936.

389. Detective Clemons told Mr. Tabler he needed to make some phone calls in order to authorize Mr. Tabler's release, then left the room pretending that he was going to make a phone call to the district attorney on Mr. Tabler's behalf. *Video* at 19:49-21:20. At that point Detective Gearhart guarded Mr. Tabler. A179. Mr. Tabler asked Detective Gearhart what he thought would happen and the officer replied, "I am sure if you can do what you are saying, they will help you out." *Video* at 21:48-21:56.

390. Detective Clemons returned to the room and advised Mr. Tabler that he had just conferred with the District Attorney and that Mr. Tabler's release hinged on whether and when the district attorney could have him arraigned, and whether the information Tabler provided about the truck checked out. *Video* at 23:49-31:22. Then, Detective Clemons told Mr. Tabler that once they had the truck spotted they would wire Mr. Tabler and let him go do the deal. Video at 33:01.

391. While pretending to wait for the "verification" about the truck, Clemons questioned Mr. Tabler about where his girlfriend's house was located and elicited directions to her home.[49] *Video* at 37:38. Mr. Tabler then asked Detective Clemons if he would make money off of "this" and Clemons replied that if "this" "turns a murder" it would be worth some money. *Video* at 39:06-39:12. Detective Clemons then advised Mr. Tabler that police were going to take him to the Bell County Sheriff's Office to "work something out." *Video* at 47:59. Before leaving, Detective Clemons asked Mr. Tabler if he had anything to do with Amine's

[49] Police capitalized on this information and went to the house of Kimberly Geary (aka Kim Marmie) where they arrested the co-defendant, Timothy Payne, who told them the location of the murder weapon. A128-29.

murder given that Amine owed Mr. Tabler ten thousand dollars. *Video* at 51:53 -53:26. After Mr. Tabler denied involvement, Detective Clemons read Mr. Tabler his *Miranda* warnings. *Video* at 53:52.

392. On the way to Bell County, Detective Clemons was directed to stop at the recently discovered scene of the murders of Tiffany Dotson and Amanda Benefield, in hopes that it would prompt a reaction from Mr. Tabler. 21.RR.27. However, Mr. Tabler displayed no reaction and he was taken to the Bell County Sheriff's Office where Detectives Steglich and Clemons commenced their interrogation at 11:10 p.m. *Id.;* A179-80. At 12:20 a.m. Mr. Tabler – without being readvised of his rights under *Miranda* – signed a statement consistent with what he had told Detective Clemons at the Killeen Police Department. See A474.

393. Because Detective Steglich believed that Mr. Tabler was being "evasive" and "fidgety," he continued to question Mr. Tabler and "pressur[ed] him on the November 26th shooting in particular." A141; 21.RR.48. In this statement, Mr. Tabler told police that he was present at the murders of Amine Rahmouni and Haitham Zayed, but maintained that Timothy Payne was responsible for shooting them. A474. At the conclusion of this statement (2:20 a.m.), Detectives Steglich and Clemons were not satisfied and continued with their interrogation. A141.

394. During this second statement, it is clear that the detectives were continuing to give Mr. Tabler the impression that he would be released if he provided more information. *See Audiotape*. At the end of the second interview, Mr. Tabler asked Detective Clemons if he would be going home and Detective Clemons told him, "I hope so." *Audio Tape* at 34:41. Detective Steglich testified that after this second statement, Mr. Tabler was "wearing down rapidly" and that he and Detective Clemons appealed to Mr. Tabler's emotions by asking him

if he had ever lost a family member, took turns standing and sitting about a foot in front of him and told him to look them in the face and tell the truth until he "stammered and cried a little bit" and then admitted that he not only shot Amine Rahmouni and Haitham Zayed but also Tiffany Dotson and Amanda Benefield. 21.RR.60-62; 23.RR.225-229. Mr. Tabler explained that he shot Amine because Amine told him he could "wipe out his whole family for 10 dollars." A141-42; 21.RR.60-61.

395. While the events at the Killeen police department were videotaped, only a short segment of the interrogation at the Sheriff's Office was audio recorded. A187, 189. No portion of Petitioner's final statement admitting to being the shooter in both incidents was recorded. *Id.*[50]

b. The Pre-Trial Motion to Suppress

396. On December 18, 2006, counsel for Petitioner filed a written motion to suppress physical evidence and statements. On March 19, 2007, Petitioner litigated a motion to suppress only the statements.

397. The State first called Detective Robert Clemons, who testified that he was enlisted by Detective Steglich to facilitate Mr. Tabler's presence at the Killeen police department on November 28, 2004, under the pretext that he wanted Tabler to work as a confidential informant. 21.RR.9, 24, 32. Detective Clemons stated that he made no promises to Mr. Tabler about the theft cases. *Id.* at 15. He also testified that Mr. Tabler's statements at the Killeen police department were recorded on videotape and that the interviews at the Bell County Sheriff's Office were recorded on audiotape. *Id.* at 25.

[50] The thirty-minute audio recorded at Bell County Sheriff's Department documents a portion of Mr. Tabler's second statement at that location.

398. On cross-examination, Petitioner's counsel focused his questioning on the fact that the detectives had concluded Mr. Tabler was a flight risk and arrested him without a signed warrant. 21.RR.18-24. Detective Clemons also denied that Detective Steglich had pressured or physically intimidated Mr. Tabler during the interrogation. *Id.* at 28.

399. Next, the government called Detective Steglich. He testified that he and Detective Clemons began questioning Mr. Tabler at 11:10 p.m., and that Mr. Tabler "appeared to be giving information voluntarily" until the interrogation concluded at 5:13 a.m. 21.RR.52.

400. On cross-examination, counsel again focused his questioning on the warrantless arrest but did elicit that Detective Steglich stood a foot in front of Mr. Tabler and pressured him to be "forthcoming." 21.RR.54-58, 60-62. At the conclusion of the motion hearing, Petitioner's counsel argued that the statements should be suppressed because Mr. Tabler's warrantless arrest was illegal as he did not pose a flight risk, and that the statements were the product of the unlawful arrest. *Id.* at 75. The court promptly denied the motion to suppress, allowing all of Mr. Tabler's statements to be admitted in evidence. *Id.* at 81. In its subsequent written conclusions of law the court addressed only whether the statements should be suppressed as the product of an unlawful arrest. CR, *Finding of Facts and Conclusions of Law*, J. Trudo, (10/27/09).

2. Counsel Was Ineffective

401. Counsel's failure to seek suppression of Petitioner's statements on the grounds that they were involuntary and that the *Miranda* warnings were insufficient constituted ineffective assistance of counsel. These arguments were meritorious and warranted suppression of Petitioner's statements.

402. Mr. Tabler's pre-warning statement, which was recorded on videotape at the Killeen Police Department, was obtained in violation of Mr. Tabler's Fifth Amendment rights.

Mr. Tabler was questioned by police about the murders at the Killeen police department for over forty-five minutes before being advised of his *Miranda* warnings in violation of *Miranda* and *Dickerson v. United State*, 530 U.S. 428 (2000). At the time of this questioning, Mr. Tabler was a prime suspect, and was not free to leave. In fact, Detective Gearhart admitted that Mr. Tabler was questioned about the murders long before he was given his warnings. 29.RR.168. Having moved to suppress the statements made on the videotape, counsel had no reason not to support that motion with valid grounds which supported suppression.

403. Furthermore, the *Miranda* warnings given to Petitioner were insufficient because he had already been questioned. *See Missouri v. Seibert,* 542 U.S. 600 (2004) (post-warning statement as well as pre-warning statement inadmissible because the midstream recitation of warnings after interrogation and unwarned confession did not comply with the warning requirement under *Miranda*). Thus, the statements Mr. Tabler made at the Bell County Sheriff's office also should be suppressed. Here, detectives from the Killeen police department and Bell County Sheriff's Office did exactly what was prohibited in *Seibert*. They brought Mr. Tabler in for questioning, did not advise him of his rights, and induced him to give a statement by placing him under arrest and offering release in exchange for information. Although Mr. Tabler's pre-*Miranda* statements were not inculpatory as to being the shooter, he admitted numerous pieces of incriminating information including: (1) that he had a dispute with Amine over money just before the murders; (2) that he was kicked out of Teazers shortly before the murders; and (3) that he was friends with Timothy Payne and had been spending a lot of time with him in the last week. *See Videotape*. Given that counsel sought to suppress the statements, they could have no reason not to present all meritorious grounds for suppression.

404. Counsel also had valid grounds to suppress all of Mr. Tabler's statements because they were the product of police coercion. In order to determine the voluntariness of a confession, the court must examine the totality of the circumstances and consider the effect that the totality of the circumstances had on the will of the defendant. *See Arizona v. Fulminante*, 499 U.S. 279, 285 (1991); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973); *Procunier v. Atchley*, 400 U.S. 446, 453 (1971). The "totality" test requires the court to consider the police tactics, the details of the interrogation, and the characteristics of the accused. *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991); *Dickerson*, 530 U.S. at 434.

405. First, the tactics employed by Detectives Clemons and Steglich were designed to overbear Mr. Tabler's will. They interrogated Mr. Tabler for over six hours, refused to accept any of his statements that he was not the shooter, physically intimidated him by standing a foot in front of him, and ultimately wore him down until he admitted guilt.

406. Second, Detectives Clemons and Steglich also induced Mr. Tabler to speak with them by repeatedly telling him that if he gave information on the murders he could be released. Once Mr. Tabler started talking, the detectives continued to let Mr. Tabler believe this until they obtained the final statement.

407. Third, Mr. Tabler had a long history of mental health disorders and confessing to crimes he had not committed. Mr. Tabler's mental instability was well documented throughout his life. In his early teenage years he was diagnosed with ADHD, Bi-Polar Disorder and Borderline Personality. *See Social History of Colleen Francis*, A427. He had a history of self-mutilation and suicide attempts and in-patient psychiatric treatment. *Id.* While in custody in California, Mr. Tabler told authorities that he had participated in disposing of the body of "Laci Petersen" and could lead authorities to the body. 25.RR.23. This was complete

fabrication on the part of Mr. Tabler. Also, in California, Mr. Tabler told prison employees that he was wanted for a murder in Florida because he had killed his mother's boyfriend. A835-46. Again, this information was totally false as his mother's boyfriend is not deceased.

408. Finally, counsel had ample grounds to challenge the credibility of the detectives' testimony at the motion to suppress, a particularly important attack given how much of the interrogation is not recorded. First, Detective Clemons - in direct contradiction to the testimony of Detective Steglich – denied that he stood within a foot of Mr. Tabler and pressured him to be "forthcoming." 21.RR.28-29. Counsel also failed to attack Detective Clemons' assertion that he made no promises to Mr. Tabler to induce him to confess. This testimony is directly contradicted by the videotape taken at the Killeen police department. Finally counsel failed to expose Detective Clemons' false testimony that the interrogation at the Bell County Sheriff's office was audiotaped. 21.RR.25. This was simply not true. Only thirty minutes of the six hour interrogation was recorded. A187, 189.

409. Taking all of the above factors into consideration, it is clear that Mr. Tabler's statements were involuntary under the Fourteenth Amendment. Counsel's failure to raise these compelling bases to suppress the statements, while advocating solely the losing argument that they were the product of an illegal arrest, was deficient.

410. As a result of counsel's inadequate performance, Petitioner was prejudiced. When counsel's effectiveness is challenged at the suppression motion, a Petitioner must establish that, absent the errors by counsel, the lower court, considering the totality of the circumstances, would have suppressed the statement and that without the statements, there is a reasonable probability that Petitioner would not have been convicted of capital murder and/or received the death penalty.

411. In light of the nature of the interrogations, and the police officers' blatant violation of *Miranda*, there is a reasonable probability that had counsel properly litigated the suppression motion, the trial court would have suppressed Petitioner's statements. Without Mr. Tabler's statements, the State had no evidence that he was the shooter other than the testimony of Kimberly Marmie. For the reasons outlined in Claim I.D, her testimony lacked credibility. Given the lack of competent evidence that Petitioner was the shooter, there is a reasonable probability that Petitioner would have been convicted of an offense less than capital murder. At a minimum, if the jury was unclear as to whether Mr. Tabler or Mr. Payne was the shooter, it is reasonably likely that Mr. Tabler would have received a life sentence. Even if the court had only suppressed the initial statements (on video) at Killeen police department, it is reasonably probable that Mr. Tabler would have received a life sentence.

412. Counsel's ineffectiveness resulted in prejudice, alone and in combination with other instances of ineffectiveness set forth in this pleading, and Petitioner is entitled to a new trial and sentencing. The Court should therefore grant habeas relief on this ground.

C. Trial Counsel Was Ineffective For Failing To Marshal The Significant Evidence That Petitioner's Statements Were Coerced, Which Would Have Supported Petitioner's Defense At Both Trial And Sentencing.

413. As outlined in Claim I.D, there was abundant evidence which cast doubt on the voluntariness and reliability of the statements police obtained from Mr. Tabler. It is well established law that "confessions, even those that have been found to be voluntary, are not conclusive of guilt. And as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise . . . unworthy of belief." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (*quoting Lego v. Twomey*, 404 U.S. 477, 485-486 (1972)). This is especially true when the defendant is not the only person charged with committing the crime.

414. At trial and sentencing, counsel failed to present any evidence or make any arguments which would cast doubt on the voluntariness, believability or veracity of Mr. Tabler's statements. Counsel failed to present and argue the available evidence of involuntariness (length of interrogation, police intimidation tactics, promises made, Mr. Tabler's mental health problems, history of false confessions). Although counsel elicited at trial that Mr. Tabler had contacted California authorities claiming that he knew the location of Lacy Peterson's body, counsel's purpose was unclear. He made no arguments at sentencing relative to this evidence.

415. Counsel had no basis to fail to present a strong challenge to Petitioner's statements introduced at trial and sentencing. In fact, in his closing argument at trial, counsel alluded to the problems with the statements when he told the jury that each of the first three statements had "value" and that Timothy Payne may have perpetrated the offense. 24 RR 32. This argument makes clear that counsel wanted the jury to believe that Petitioner's statement that he shot all four victims was false; therefore, he had no strategic reason for failing to present the abundant evidence supporting this conclusion.

416. Petitioner was prejudiced. The prosecutor made vigorous use of the statements when he told the jury that there were five exhibits out of sixty-eight which answered the question of guilt definitively: "Richard Lee Tabler told you in his own words that he shot Amine Rahmouni and Haitham Zayed." 24 RR at 24. Similarly, at sentencing, the prosecutor capitalized on Mr. Tabler's statements that he shot the two young women when he asked the jury, "[h]ow did [Tabler's] slow brain waves cause him to pull the trigger in front of Tiffany's face. . . and how does his neglectful childhood cause him to shoot Amanda?" 29.RR.55-56. The prosecutor also told the jury in his opening statement, "You will also get to see Richard

Tabler on video when he was talking to Bobby Clemons when no one but him knew about the second murder. You can see how he was affected by it, how he reacted to it, what kind of person he is." 25.RR.8.

417. Effective counsel would have argued that Mr. Tabler's third statement at Bell County, which started at 3:45 a.m., was not reliable or worthy of belief because the detectives kept Petitioner – a seriously mentally ill man with a history of providing false confessions – in an interrogation room for over six hours, refused to accept as true any of the statements in which he denied culpability, and physically intimidated him and continued to promise him that they would release him if he gave them a satisfactory statement. Counsel could have persuaded the jury that the testimony of Detectives Steglich and Clemons about the circumstances of the interrogation was not worthy of belief because (1) their testimony was in conflict with one another; (2) Detective Clemons's testimony was in conflict with the videotape; and (3) the circumstances surrounding the interrogation at Bell County were extremely suspect given the fact that only thirty minutes of the six-hour interrogation was recorded. Had counsel presented this evidence and made these arguments there is a reasonable probability the jury would have convicted Mr. Tabler of a lesser offense or spared his life. Petitioner has been prejudiced by counsel's deficiency, independently and in combination with the other instances of ineffectivenss set forth in this pleading, and is entitled to a new trial and sentencing. The Court should therefore grant habeas relief on this ground.

D. Counsel Was Ineffective At Trial And Sentencing For Failing To Impeach The State's Witness, Kimberly Geary, In Violation Of Mr. Tabler's Sixth And Fourteenth Amendment Rights.

1. Facts

418. At trial, the State called Mr. Tabler's former girlfriend, Kimberly Geary (aka Kimberly Marmie). Ms. Geary explained that she met Mr. Tabler at a nightclub in late

November, 2004. She brought him back to her house that same night with the intention of having a "one night stand," but Mr. Tabler stayed with her and started moving belongings into her home. 23.RR.173. However, she only had sexual relations with him one time, and did not want a relationship with him. 23.RR.158

419. On Thanksgiving evening of 2004, she, along with her friend Shay Harrington, accompanied Mr. Tabler to his family's house for dinner. 23.RR.160. Thereafter, the three of them picked up Mr. Chris Elston and Timothy Payne at Fort Hood and returned to Kim's house where they proceeded to "party." 23.RR.161-162. She stated that everyone except for her was using drugs (she claimed she only drank beer), and at one point she videotaped the group using cocaine. *Id.* at 162. At some point in the evening, Mr. Tabler, Mr. Payne, and Mr. Elston left the house.[51] *Id.*

420. Ms. Geary testified that in the early morning hours, she was awakened by Mr. Tabler and Mr. Payne. Mr. Tabler told her "he had just killed two guys" and then he showed her a short videotape which, according to her, showed Mr. Tabler grabbing the passenger of a white car, throwing him on the ground, shooting him in the head, and saying "who has the power now." 23.RR.165. However, Ms. Geary told police on the night of Mr. Tabler's arrest that it was *Tim* who showed her the videotape that morning. A668.

421. Ms. Geary then explained that both Mr. Payne and Mr. Tabler were looking through a black bag that contained a passport and cash. 23.RR.167. When asked about their demeanor, Ms. Geary described Mr. Payne, who had a lot of blood on him – as "nervous" and

[51] Ms. Geary gave conflicting accounts as to the time the three left the house. In her first statement to police, just hours after Mr. Tabler's arrest, she told police that Tabler, Payne and Elston did not leave the house until approximately 3:00 a.m., and in her second statement, January 7, 2005, she told police she was wrong about the time and they must have left much earlier. A668, A670.

also a "little agitated." 23.RR.168. She stated that Mr. Tabler appeared "normal," "like nothing had just happened," and "more irritated that that's all the money he got and it wasn't that much." 23.RR.168.

422. Ms. Geary testified that police came to her house a few days later and she signed a consent form allowing police to search her residence. 23.RR.170. After the search, Ms. Geary was taken to the Bell County Sheriff's Office where she provided a three-page statement. A667. Approximately five weeks later, on January 7, 2005, she signed a nine-page statement. A670.

423. On cross-examination, counsel established: (1) Ms. Geary got a good look at the videotape and actually saw Mr. Tabler shooting someone, 23.RR.180; (2) Mr. Payne did not say anything about what happened that night and (through counsel's own leading question) that "[Mr. Payne] just did what he was told . . . " 23.RR.179; and (3) Ms. Geary takes Zoloft for panic attacks and anxiety. 23.RR.176.

424. The State recalled Ms. Geary to testify at sentencing about her knowledge of the murder of the two women on November 28, 2004. 26.RR.137. Ms. Geary explained that on that day she was with Richard Tabler and Shay Harrington. She left with Shay to visit Chris Elston at the Fort Hood barracks but met up with Mr. Tabler back at her house at approximately 8:30 p.m. He asked to speak with her privately and told her that he had killed Zoie and Tiffany because "I guess they were going around saying that he was the one who killed the first two, Amine and Frank." 26.RR.141. She described Mr. Tabler's demeanor as "proud." 26.RR.141.

425. On cross-examination, counsel reiterated parts of Ms. Geary's direct testimony and elicited that Mr. Tabler could be quite charming and normal at times, but also exhibited bizarre behavior. 26.RR.145-146.

426. Officer Carl J. Pregande, of the Killeen police department, was present during the search of Ms. Geary's residence on November 28, 2004. He reported that Timothy Payne let police into the residence and described his interaction with Ms. Geary:

> Kimberly appeared nervous and said that when she signed the consent to search that she could tell us if she didn't want us searching in a particular place. Kimberly then told me that the nightstand on the west side of the bed is a place she didn't want me to search. I asked her if she was worried about some narcotic being in there as the focus of our investigation doesn't involve any drugs and that if there was something in their[sic] I would assure her that no one would be charged with it. She then advised me that she knew a small amount of cocaine was in their [sic] belonging to Richard Tabler. She advised that she knows it is in there but it is not hers and as long as she wouldn't be charged it was ok for me to search that area also.

A176-77.

427. In Ms. Geary's second statement to police, she told Detective Jacobs:

> The Army has told my friend Shay Harrington that she needs to get a lawyer. That is scaring me and freaking me out, I have an anxiety condition. They told her that she is under investigation for dealing drugs with "Blue." She didn't get the drugs. Chris Elston would always get the drugs.

A670.

428. Through the course of the investigation, Detective Jacobs interviewed Mr. John Yarborough, an inmate from the Bell County Jail who had been housed with Mr. Timothy Payne in December of 2004. Mr. Payne and Mr. Yarborough struck up a friendship and Mr. Payne disclosed information about his open murder charges to Mr. Yarborough. In one of those discussions, Mr. Payne explained that at the time of the murders Kimberly Geary was using heroin and that he (Payne) was having a sexual relationship with Ms. Geary behind Richard Tabler's back. A679.

2. Counsel Was Ineffective

a. Counsel's Performance was Deficient

429. Ms. Geary's testimony was crucial to the State's case for capital murder as well as a death verdict against Mr. Tabler. Other than the confession of Mr. Tabler, Ms. Geary was the only witness who could identify Mr. Tabler as the shooter in the first incident because she allegedly viewed a videotape of the murder and because Mr. Tabler made statements to her. Without her testimony, the jury was left to decide whether Mr. Tabler's initial statements to police (that Timothy Payne was the shooter) were accurate or whether his final statement (after six hours of questioning) was the truth. Ms. Geary also provided damaging testimony in support of a death verdict claiming that Mr. Tabler seemed "normal" and "proud" after the murders.

430. Given the critical nature of her testimony, counsel could have no basis not to investigate and challenge her credibility. Effective counsel would have investigated the statements of Mr. Yarborough and interviewed witnesses about Ms. Geary's drug use and relationship with Mr. Payne.

431. Effective counsel would have confronted Ms. Geary on the following issues: (1) her drug use, and whether she was under the influence of heroin, alcohol, and zoloft during the relevant time periods, including at the time she allegedly viewed the videotape, had discussions with Mr. Tabler about the murders, gave her statements to police and provided testimony; (2) her bias in favor of Mr. Payne, given the nature of her relationship with him; and (3) her motive to testify favorably for the government, given that she had not told police of the information she had about the murders, and that police recovered narcotics and a murder weapon from her home. *Davis v. Alaska*, 415 U.S. 308 (1974).

b. Petitioner was Prejudiced

432. As a result of counsel's failure to impeach Ms. Geary, Mr. Tabler was prejudiced at trial and sentencing. During the guilt phase closing arguments, defense counsel had no basis to argue to the jury that Ms. Geary's observations of the videotape were either confused or untrue. The State capitalized on counsel's failure to impugn her credibility in testifying that she saw Mr. Tabler (not Mr. Payne) firing the weapon. Mr. McWilliams told the jury:

> Kim Marmie told you she saw the last part of this in that [videotape]. She saw it happen. She saw Richard Lee Tabler, center of attention, pull Amine from the passenger side of that car and you can see where [Mr. Rahmouni] shoe is still in [the car]. He's already been shot, jerks him out. [Mr. Rahmouni] got his hand in the air. Kim told you that. [Mr. Tabler] tells you that. And [Mr. Tabler] takes the gun and point blank pulls the trigger. That put Amine's blood on that gun. That gun was close enough to him that the blood that came from that wound flew back onto the gun.

24.RR.49.

433. Mr. McWilliams told the jury that Mr. Tabler was "the guy who calls the shots" and "[t]he defense attorneys asked Kim Marmie, does Tim just do what he is told? Yes." 24.RR.48.

434. Likewise, at sentencing, Mr. McWilliams argued that Mr. Tabler's demeanor after the murders warranted a sentence of death. He reminded the jury that "[Mr. Tabler] was so proud of that. He showed Kim Marmie on the videotape him doing it." 29.RR.40.

435. Because counsel had not confronted Ms. Geary with the available impeachment, all of which was readily available in the State's discovery materials, counsel could offer the jury no reason to question her veracity. Competent counsel would have presented this impeachment and then told the jury in summation, at both trial and sentencing, that Ms. Geary was not worthy of belief.

436. Counsel could have argued that Ms. Geary was not being honest about her use of drugs. In addition to Mr. Yarborough's testimony, counsel could have pointed the jury to the fact that Ms. Geary allowed numerous drug users to come and go from her house at will. Common sense suggests that it would be unlikely that Ms. Geary would permit persons actively involved in the drug culture (both buying and selling) to stay at her house if she were not also participating in such illegal activity. Counsel could have pointed out that drugs were found in her bedroom and it was certainly plausible that police did not find other drugs only because, by their own admission, they were not searching her house for drugs.

437. Counsel could have also argued to the jury that her testimony about Payne's demeanor and lesser involvement was questionable given the fact that she was involved in a sexual relationship with Mr. Payne. In addition to Yarborough's testimony, counsel could have supported this argument by pointing out that Mr. Payne was present with Ms. Geary late at night when police arrived, and that Ms. Geary admitted she was not interested in Mr. Tabler, did not want a relationship with him, and only had sexual relations with him on one occasion.

438. Finally, counsel could have told the jury that Ms. Geary had everything to gain by providing favorable testimony for the state. Ms. Geary certainly could have been arrested for the drugs recovered in her bedroom and her role in allowing evidence of a murder to be destroyed in her home. Based on her comments to Detective Jacobs that she was "freaking out," it was evident that she was concerned about her own involvement at the time she provided information to the police.

439. Individually and cumulatively with the other claims in this petition, trial counsel's deficiencies prejudiced the defense at both phases of trial.

E. The Cumultive Effect of Counsel's Deficiencies Prejudiced the Defense at Both the Guilt-Innocence and the Penalty Phase.

440. Cumulatively, counsel's deficiencies in the preparation and presentation of the guilt-innocence phase of trial prejudiced Mr. Tabler's defense. This Court cannot have confidence in the outcome of this trial. *See Strickland*, 466 U.S. at 694. The Court cannot even have confidence that the state court selected a panel of qualified, unbiased jurors, given counsel's failure to conduct an adequate examination of prospective jurors sufficient to allow the intelligent exercise of cause and peremptory challenges. Counsel agreed to the dismissal of many jurors without *any* questioning, even though many of these jurors lacked any obvious disqualification; failed to ask obvious follow-up questions of jurors whose fitness or unfitness to serve was questionable; and exposed jurors to significant misstatements of law proffered by the prosecution and court (and even defense counsel) without challenge. Counsel was deficient respecting the most substantial evidence against Mr. Tabler, his custodial statements, advancing a losing basis to suppress the evidence, but failing to move to suppress it on legally supported, viable grounds or even to marshal evidence during trial that would have undermined the statements' reliability in the jurors' eyes. Counsel was also deficient respecting the most important witness against Mr. Tabler, Kim Geary, failing to use important and available impeachment evidence during her cross-examination.

441. These deficiencies require relief both individually and cumulatively. There is a reasonable probability that, but for counsel's deficiencies respecting the selection of the jurors who would determine his guilt or innocence, the most important evidence against him, and the most important witness against him, the jurors would have found him not guilty or guilty of a lesser offense. Moreover, each of these deficiencies, individually and cumulatively, prejudiced

Mr Tabler at sentencing, as there is a reasonable probability that, had counsel performed adequately, one or more jurors would not have voted in favor of a death sentence. *See Strickland*, 466 U.S. at 694. This Court should accordingly grant habeas relief on this ground.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE.

442. Mr. Tabler stood trial for his life represented by attorneys who failed to implement their own strategy in a reasonable manner. Trial counsel failed to conduct the constitutionally required background investigation that would have disclosed his congenital birth defects, and would have provided firsthand accounts of his neglected, chaotic upbringing. Their failure to undertake this foundational work had ripple effects throughout the trial and was exacerbated by other failures. Counsel failed to prepare and present expert testimony supported by the evidence they did have, let alone the voluminous, rich social history they could have provided. Their experts, as a result, faced dramatically discrediting cross-examination. Counsel did nothing to investigate the unadjudicated bad acts offered by the state to demonstrate future danger, or to object to the admission of inadmissible evidence. They made no objection to inadmissible victim impact testimony or to the prosecutor's summation misconduct. In the defense summation, counsel abandoned their own theory and conceded – unnecessarily and inaccurately, in light of their trial experts' diagnoses, let alone the assessments that would have been available through proper investigation and preparation – that their client was a sociopath. Many of these deficiencies were individually sufficient to prejudice the penalty phase defense. Because there is a reasonable probability that, but for the combined effect of all counsels' deficient performance, the jurors would have spared Mr. Tabler's life, counsel provided ineffective assistance at the penalty phase. U.S. Const. amend. VI.

A. Counsel Conducted A Constitutionally Inadequate Investigation Of Mr. Tabler's Background And Mental Health.

443. Richard Tabler's brain was hard-wired for disaster from before his birth. The extra X chromosome that is part of his genetic makeup, and his mother's alcohol consumption

during pregnancy, prevented his brain from developing normally in the womb and distorted its development during childhood and adolescence. As he grew, he developed other severe mental health conditions, some directly related to genetic, neurological, and hormonal disorders and others to the neglected, chaotic upbringing that was superimposed on his biological defects. From his earliest years, people who knew him noticed his profoundly impaired ability negotiate the world and cope with its challenges – socially, academically, and practically. Poignant accounts of his struggles, confirmed by documentary evidence, were available from scores of people who knew him both within and outside his family. Experts in Klinefelter's Syndrome, Fetal Alcohol Spectrum Disorder, neuropsychology, and psychiatry could have explained how his multiple medical and mental health disorders, interacting with his life circumstances, affected his development and functioning for his entire life.

1. Counsel Performed Deficiently.

444. Because Mr. Tabler's attorneys violated "well-defined" norms that require counsel to investigate all reasonably available mitigating evidence, their penalty phase presentation, based on "rudimentary knowledge" from "a narrow set of sources," was unreasonable and prejudicial. *See Wiggins*, 539 U.S. at 524-25; *see also Rompilla*, 545 U.S. 374; *Williams,* 529 U.S. 362. The Supreme Court has clearly established that counsel in a capital case must conduct a reasonably thorough background investigation even without any specific prompts. *See Rompilla*, 545 U.S. at 377 ("We hold that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts" to investigate background); *Porter*, 558 U.S. at 40 (counsel's failure to conduct background investigation deficient although client "fatalistic and uncooperative" and several family members "not

particularly helpful"). Mr. Tabler's trial attorneys never conducted that independent investigation.

445. The Fifth Circuit and other circuits have repeatedly held that controlling Supreme Court precedent required habeas relief in similar capital cases. *See, e.g., Adams v. Quarterman*, 324 F. App'x 340, 2009 WL 1069330 (5th Cir. April 22, 2009); *Walbey v. Quarterman*, 309 F. App'x 795, 2009 WL 113778 (5th Cir. Jan. 19, 2009); *see also Williams v. Allen*, 542 F.3d 1326, 1329-30 (11th Cir. 2008); *Gray v. Branker*, 529 F.3d 220, 225-26 (4th Cir. 2008). Applying clearly established federal law, these cases collectively hold that trial counsel in a capital case must make an "informed decision"[52] about mitigation strategy, and must present "the details,"[53] "the full picture,"[54] the "entire,"[55] "cohesive,"[56] and "complete"[57] story, not a "scattered"[58]narrative that is "[in]accurate"[59] or "misleading,"[60] but "the strongest mitigation case possible."[61]

446. In *Walbey*, for example, trial counsel presented the petitioner's grandmother and two psychologists at trial, but failed to speak to a number of potential witnesses who had first-hand knowledge of his troubled childhood, failed to correct the grandmother's misleading testimony painting a too-rosy picture of Walbey's past, and failed to rehabilitate misleading cross-examination about whether Walbey fit the criteria for antisocial personality disorder. 309 F. App'x at 796-97. The Court of Appeals, citing case law "that firmly establishes a duty

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[52] *Adams*, 324 F. App'x at 349.
[53] *Walbey,* 309 F. App'x at 803.
[54] *Gray,* 529 F.3d at 238.
[55] *Id.* at 237.
[56] *Id.* at 235.
[57] *Walbey* 309 F. App'x at 802; *Williams*, 542 F.3d at 1340.
[58] *Gray*, 529 F.3d at 233 n.2.
[59] *Walbey* 309 F. App'x at 802.
[60] *Williams,* 542 F.3d at 1340.
[61] *Id.* at 1340.

to investigate the background and character of a capital defendant, along with his family and social circumstances and mental health history," held that counsel's investigation, and hence his performance, was deficient because it was "severely limited." *Id.* at 800-01.

447. Similarly, in *Adams*, trial counsel and his investigator spoke with the petitioner's mother and stepfather and one of his siblings, but found none of them particularly informative or willing to help. The investigator testified that he did not make more active efforts to track down the petitioner's other family members or to investigate his social, medical, psychological, educational, abuse, and other histories because trial counsel did not ask him to do so. 342 F. App'x at 347-49. Trial counsel opted not to present mitigating evidence and instead adopted a punishment phase strategy of portraying the co-defendant as the instigator and the petitioner as only an accomplice to the murder, and stressing the petitioner's cooperation with police. *Id.* at 343. On appeal from the district court's grant of penalty phase habeas relief, the Court of Appeals criticized the "skewed perspective" of counsel and his investigator, who attempted to excuse their deficient investigation efforts because Adams's other family members had not "come forward." *Id.* And it held that counsel's deficient investigation made it "impossible" to make an "*informed decision*" concerning a penalty phase strategy. *Id.* at 349 (emphasis in original); *accord Lewis v. Dretke*, 355 F.3d 364, 367-68 (5th Cir. 2003) (accepting testimony of petitioner's sisters that trial counsel never interviewed them, and finding counsel ineffective in capital sentencing for failing to investigate and present evidence of petitioner's abusive childhood); *Moore v. Johnson*, 194 F.3d 586, 616-17 (5th Cir. 1999) (counsel deficient in penalty phase because, although he knew some of petitioner's

background, he did not investigate or present mitigating evidence that would have shown abuse and abandonment by family).[62]

448. In *Wessinger v. Cain,* Civ. No. 04-637-JJV, 2015 WL 4527245, *6-*7 (M.D. La. July 27, 2015), the district court found that counsel was deficient in a capital case because he conducted only a single, one-hour meeting with seven family members, and later presented numerous "character" witnesses, but never conducted a background investigation. Counsel also failed to provide independent and objective information to the experts he presented at the penalty phase. "Ultimately, there were seventeen witnesses [including mental health experts] called by [trial counsel] at the penalty phase, but there is no evidence to suggest that these were quality witnesses for purposes of mitigation." *Id.* at *7.

449. As in these cases, Richard Tabler's trial counsel never conducted a constitutionally adequate background investigation. Until shortly before trial, the only family interview conducted by any member of the defense team was a single meeting between mitigation specialist Byington and Lorraine Tabler (Richard's mother) and Kristina Martinez (his sister). Two weeks before trial, Dr. Jacobvitz spoke by phone with Lorraine and Robert Tabler and Kristina Martinez. No one from the defense ever learned anything about the information available from dozens of other witnesses. As in *Adams*, *Walbey*, and the other cases cited above, counsel failed to develop a complete or detailed picture of Mr. Tabler's background and life circumstances, or even an accurate one. *See Wiggins*, 539 U.S. at 524-25; *see also Rompilla*, 545 U.S. 374; *Williams,* 529 U.S. 362. Collecting records and relying on a

[62] *See also Williams*, 542 F.3d at 1329-30 (granting relief, although counsel presented the defendant's mother and consulted a mental health expert, because counsel's deficient investigation led to a misleading mitigation presentation that masked family dysfunction); *Gray*, 529 F.3d at 225-26 (granting relief, although counsel presented family testimony and was aware of psychiatrist's report, because adequate investigation would have uncovered many indicia of petitioner's mental health impairments).

mental health expert to touch base with a few immediate family members at the last minute was not enough to comply with the Eighth Amendment.[63]

2. Counsel's Deficient Performance Prejudiced the Defense.

450. There is a reasonable probability that, if counsel had conducted the background investigation that the Constitution requires, and presented its results at the penalty phase, the jurors would have chosen life over death.

451. The *Walbey* court found prejudice in remarkably similar circumstances. It observed that "*Williams [v. Taylor]* . . . stands for the proposition that counsel can be prejudicially ineffective even if some of the available mitigation evidence is presented and even if there is psychiatric testimony." 309 F. App'x at 802. The mitigating evidence introduced at trial was substantially incomplete and some of it was inaccurate; as the magistrate judge had observed, it was "scant, bereft in scope and detail." *Id.* at 803. Furthermore, the defendant's own mental health expert "did severe damage to Walbey's case" when counsel failed to rehabilitate him following damaging cross-examination about antisocial

[63] *See Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (counsel's investigation deficient although he presented "perfunctory" testimony from mother, sister, and mental health expert); *Sowell v. Anderson*, 663 F.3d 783 (6th Cir. 2011) (counsel's investigation deficient although he presented several witnesses, including petitioner's wife); *Foust v. Houk*, 655 F.3d 524 (6th Cir. 2011) (counsel's investigation deficient although parents and psychiatrist testified); *Goodwin v. Johnson*, 632 F.3d 301 (6th Cir. 2011) (counsel deficient because "little contact" with family and no records obtained); *Cooper v. Sec'y, DOC*, 646 F.3d 1328 (11th Cir. 2011) (unreasonable for counsel to end investigation after speaking only to petitioner, mother, and expert); *Johnson v. Sec'y, DOC*, 643 F.3d 907 (11th Cir. 2011) (counsel deficient for waiting until the end of guilt-innocence phase to begin mitigation investigation, failing to interview family, physicians, or teachers, and presenting only brief testimony from family and treating psychologist); *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011) (investigation deficient, although investigator interviewed 40-50 witnesses, because witnesses were asked only statutory character evidence questions and investigator followed up only on positive responses); *Griffin v. Pierce*, 622 F.3d 831 (7th Cir. 2010) (investigation deficient, although counsel presented petitioner and another witness, because no exploration of petitioner's background); *Johnson v. Mitchell*, 585 F.3d 923 (6th Cir. 2009) (counsel's preparation for capital resentencing, limited to reading the previous trial transcript and speaking to the petitioner, deficient); *Johnson v. Bagley*, 544 F.3d 592 (6th Cir. 2008) (counsel's "surface level" investigation deficient).

personality disorder. *Id.* at 803-04. Neither the brutality of the crime nor the possibility that some of the undiscovered mitigating evidence might have been unhelpful could ameliorate the prejudice created by counsel's deficiencies. *Id.* at 804-05. The court accordingly granted habeas relief. *Id.* at 806.

452. Similarly, the *Adams* court granted relief after determining that the district court had properly considered affidavits from uncalled witnesses in assessing prejudice. *Id.* at 350. These affidavits established substantial, readily available mitigating evidence of Adams's childhood abuse, neglect and abandonment, which could have caused his numerous psychological problems. *Id.* at 351-52. The court rejected the State's claim that it should discount the proffered evidence because it was "double-edged." Even though the State might have impeached the affiants, if they had testified at trial, with evidence of Adams's prior bad acts, "we cannot conclude that the aggravating effect of this evidence would have outweighed the mitigating evidence in a reasonable jury's minds." *Id.* The court accordingly found that counsel's deficient performance prejudiced the defense and granted penalty phase habeas relief. *Id.*

453. In *Wessinger*, the defendant's brother had been previously contacted and interviewed. However, the court found that an adequate investigation would have uncovered, not only a neurocognitive disorder, but a family history of "poverty, alcoholism, violence, and struggle." 2015 WL 4527245 at *8-9. The court found a reasonable probability that the undiscovered evidence would have caused a different outcome and granted relief. *Id.* at *9.[64]

[64] *See also Foust*, 655 F.3d at 539 (unpresented evidence "paints an altogether different picture of [the petitioner's] childhood); *Johnson v. Mitchell*, 585 F.3d at 943 (prejudice established because new evidence "differ[ed] in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing."); *Johnson v. Bagley*, 544 F.3d at 602 (state court rejection of claim unreasonable because trial counsel's investigation "only

454. In Mr. Tabler's case, because of counsel's unreasonably limited investigation, the jurors received a misleadingly sanitized picture of his background. Lorraine Tabler did not describe his health or behavior during childhood except to mention that Richard was born blue because of fluid in his lungs. Her account of his upbringing merely focused on her own problems instead of his development. She criticized her husband's infidelities and what she viewed as his lack of interest in Richard, described her own abrupt departure from the family home and multiple moves after that, and testified that Richard as an adolescent did not like restrictions and was a "cutter." 27.RR.73-106. Kristina Martinez's description of his childhood was understated to the point of inaccuracy, and incomplete. The only childhood details the jurors learned from her could have described many children: that Richard was prone to tantrums and hungry for attention as a small child, that he received an ADD diagnosis, and that he fell from a tree in his school years. 27.RR.122-41.

455. The truth of Richard's childhood and youth was far more bleak and much more blighting. If trial counsel had conducted an adequate background investigation, they could have developed a compelling case for life. For example, the jurors could have learned that it was not only Robert Tabler who stayed out drinking and philandering on his way home from work. Lorraine Tabler also abused alcohol, during her pregnancy with Richard and at other times, and had wild mood swings. The children were unsupervised; Kristina had major responsibility for Richard's care, although she was only seven years old when he was born.

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scratched the surface of [petitioner's] horrific childhood"); *Williams v. Allen*, 542 F.3d at 1342 (evidence counsel failed to uncover "paints a vastly different picture of [petitioner's] background than that created by [his mother's] abbreviated testimony."); *Gray*, 529 F.3d at 235-38 (prejudice found where counsel failed to provide the "full" and "cohesive" picture); *Walbey*, 309 F. App'x at 802, 803 (prejudice found where trial counsel failed to present "the details" of a "complete" story, and instead presented an "inaccurate" one).

Both parents, but especially Lorraine, were physically abusive. After Lorraine's and Robert's marriage broke up, she cycled through a series of unstable and often violent relationships with men and stormed in and out of Richard's life.

456. The jurors also could have learned that Richard was developmentally delayed. He was so slow to walk and talk that adults suspected that he was deaf. He stuttered, and he wet the bed until age eight. He sometimes curled up into fetal position and rocked. He had uncontrollable tantrums, beginning before he could speak and continuing long past the age when most children outgrow them. His social reactions to others were often inappropriate. As Richard entered puberty, he grew little facial hair and his voice did not change.

457. Instead of relying on Dr. Stone's parroting of an attention deficit diagnosis from the records of a treating psychologist – undercut on cross-examination because the school system Richard attended never formally classified him – a reasonably adequate background investigation could have uncovered vivid first-hand accounts by Richard's elementary school teachers of his "classic ADHD" behaviors and their laments that his school system had no services for children like him at the time. The teachers could have described Richard's inability to interact with his classmates in a socially appropriate way, and their concerns about his lack of supervision at home. An adequate investigation also would have uncovered first-hand accounts of Richard's mood swings and erratic teenage behavior, with stories about his threats and attempts to kill himself, and, later, his alcohol and drug abuse.

458. In summation, the prosecutor derided the defense testimony about Mr. Tabler's background and upbringing. He questioned the ADHD diagnosis – made by a child psychiatrist after appropriate testing – because the experts had not cited to supporting school

records.[65] And he suggested that even the limited testimony of Lorraine Tabler and Kristina Martinez was untrue, because otherwise other family members would have supported it. 29.RR.36-38. He told the jurors, "you can take that to the bank, folks." 29.RR.43. The prosecutor could not have made those arguments if the defense had prepared and presented the results of a reasonably complete background investigation. Instead, the jurors made their life-or-death decision on the basis of an inaccurate, superficial picture, "scant, bereft in scope and detail." *See Walbey*, 309 F. App'x at 803. There is a reasonable probability that, if the jurors had known from firsthand accounts, not just from his mother and sister but from brothers, friends, boyfriends, girlfriends, teachers, administrators, and others, the full truth about Richard Tabler's chaotic, lonely childhood and vulnerable mental and emotional makeup, they would not have voted for death. Trial counsel's deficient investigation and presentation of Mr. Tabler's background and upbringing, alone and in combination with other deficiencies set forth in this pleading, prejudiced Mr. Tabler at the penalty phase and deprived him of the effective assistance of counsel. This Court should therefore grant habeas relief on this ground.

B. Counsel Failed To Prepare and Present Appropriate Mental Health Evaluations.

1. Counsel's Performance Was Deficient.

459. Trial counsel consulted and called mental health experts without providing them with the results of a reasonably comprehensive mitigation investigation and without directing them to conduct reasonably comprehensive evaluations. In effect, counsel left the experts to fish in the dark for Mr. Tabler's history, conducting their evaluations in a short time with no idea of what information they might find or whether anyone or anything could corroborate or elucidate what they learned through their evaluative interviews. Partly as a result, important

[65] In fact, one of Mr. Tabler's high school records reflects the diagnoses. A450.

medical disorders – Klinefelter's Syndrome and Fetal Alcohol Spectrum Disorder – went undetected, while other disorders, such as his borderline personality and bipolar disorders, received only glancing development and no corroboration from the testimony of persons who had known him. Counsel never obtained necessary follow-up examinations required by Mr. Tabler's history. *See Walbey*, 309 F. App'x at 803-04; *Adams*, 324 F. App'x at 351-52.

460. The Supreme Court has repeatedly found investigations deficient, and the deficiencies prejudicial, in part, because counsel failed to uncover mitigating mental health evidence. *See Rompilla*, 545 U.S. at 391 (adequate investigation would have disclosed mental health mitigation); *Wiggins*, 539 U.S. at 535 (adequate investigation would have uncovered petitioner's "diminished mental capacities"); *Williams*, 529 U.S. at 396 (constitutionally adequate investigation would have disclosed that petitioner was "borderline mentally retarded"). The Court has reaffirmed these principles in its recent opinions. *See Sears*, 130 S. Ct. at 3267 ("proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments," along with other evidence); *Porter*, 130 S. Ct. at 454 (deficient investigation prejudicial, in part, because it failed to uncover petitioner's "brain abnormality"); *cf. Hinton v. Alabama*, 131 S. Ct. 1081, 1089 (2014) (where counsel's deficiency deprived defendant of expert testimony to replace inadequate expert, deficiency was prejudicial because there was a reasonable probability that adequate expert could have raised a reasonable doubt).

461. In a case similar to Mr. Tabler's, *Miller v. Dretke*, 420 F.3d 356 (5th Cir. 2005), the Fifth Circuit granted habeas relief because trial counsel, like attorney Harris and his co-counsel in Mr. Tabler's case, failed to develop mental health evidence in mitigation of sentence. At the non-capital sentencing trial, counsel elicited testimony from Miller and her

ex-husband concerning her traumatic brain injury, mental health treatment, and memory losses, but counsel made no effort to contact her treating experts because he expected that she would plead guilty. *Id.* at 358-59. All three experts could have provided evidence of Miller's organic and emotional impairments. *Id.* at 359. The Court of Appeals faulted trial counsel for deciding not to call Miller's physicians as witnesses without first speaking to them. *Id.* at 362, 363-64. The evidence would have been highly relevant to punishment because it would have provided an explanation for Miller's behavior and for the memory problems that affected her trial testimony. *Id.* at 363. The Court found that counsel's conduct was objectively unreasonable, and, after reweighing the evidence in aggravation against the totality of the available mitigating evidence, that there was a reasonable probability that the sentencing outcome would have been different but for counsel's errors. *Id.* at 364-66.[66]

462. Even though capital counsel must conduct a reasonably thorough background investigation in every case, in Mr. Tabler's case counsel had information before trial that should have clearly signaled that they needed not only to prepare a comprehensive social history but also to seek expert advice about the social history's significance. As in *Miller*, trial counsel ignored the signals and failed to develop highly relevant medical and mental health evidence that could have mitigated punishment.

463. Counsel knew or should have known that:

[66] *Accord Wessinger*, 2015 WL 4527245 at *9 (finding prejudice for failure to develop evidence of brain damage and other mitigation); *Worthington v. Roper*, 619 F. Supp. 2d 661, 688-89 (E.D. Mo. 2009) ("[H]ad the trial judge heard testimony from properly prepared defense experts, there is a reasonable probability that petitioner would have received a different sentence."); *McNeill v. Branker*, *supra,* 601 F. Supp. 2d 694, 721 (E.D.N.C. 2009) (counsel ineffective for failing to investigate social history and develop mental health evidence).

- Mr. Tabler has an unusual appearance. Although he is over six feet tall, he has a frail, undeveloped build and undersized testes. He has a high-pitched voice and does not shave. A431; A463, A589, A632, A649.
- Lorraine Tabler, Mr. Tabler's mother, reported that he was born blue, almost black, because of fluid in his lungs. 27.RR.79.
- Robert Tabler, Mr. Tabler's father, reported that Lorraine Tabler drank during her pregnancy. A433.
- Mr. Tabler's performance in his classroom grades and on standardized tests was abysmal. A445-50.
- A psychologist who both evaluated and treated Mr. Tabler in his early teen years found that he has severe attention deficits. A458.
- An EEG conducted eighteen months before trial revealed slow brain waves in the left frontal-temporal region. The expert who interpreted the data indicated that persons with deficits in that area would have trouble learning and planning in detail for the future. A415.
- Mr. Tabler had impaired scores on neuropsychological tests of executive functioning and memory conducted three months before trial. A420.

464. If counsel had conducted the background investigation that these details should have demanded and the Constitution in any case requires, they would have learned much more about the devastating interactions among his congenital defects, his neglected and violent life circumstances, and his mental and emotional disorders. *See Porter*, 558 U.S. at 40 (counsel deficient, in part, for ignoring information in court-ordered competency evaluation that should have prompted further investigation); *Wiggins*, 539 U.S. at 525 (counsel deficient for not

following up on information in Department of Social Services records in their possession). From a background investigation they would have learned other information that should have led them to investigate medical and developmental problems:

- Lorraine conceded, and friends and family confirmed, that she drank repeatedly during her pregnancy with Richard. A433.
- Richard was slow to walk and talk, sucked on two fingers well into his teens, struggled to speak, and still wet the bed at age eight. A441-42.
- Sometimes he curled up into fetal position and rocked himself. A442.
- He had a poor appetite, skipping or refusing meals and showing little interest in food. A442.
- Even after he reached the age of puberty, he did not begin shaving and his voice did not change. A442.
- He had early, severe dental problems and had lost all his upper teeth by age 22. His gingevitis and bleeding gums required corrections officials to extract lower teeth as well. A458, 463.
- He had hand tremors throughout his life. A442.
- Richard endured infant-like tantrums well into his childhood. He had fits of rage in which his eyes rolled back into his head and he collapsed onto the floor. Sometimes they went on for hours. Sometimes he lost consciousness. A442.
- He often had inappropriate reactions or affect in response to his social setting, and had wide mood swings. A443.

465. Counsel had no strategic reason not to conduct a thorough investigation of Mr. Tabler's medical and mental health and present its results to experts and to the jurors. Indeed,

their strategy from shortly after their appointment through the end of trial was to attempt to demonstrate that Mr. Tabler was biologically impaired. They ordered an EEG exam early in the case, and later ordered neuropsychological testing. Mr. Harris promised the jurors in opening that the defense would demonstrate that Mr. Tabler was not "normal." 27.RR.69. He presented the EEG results and asked Dr. Proler if Mr. Tabler had brain damage. 28.RR.27. Mr. Harris and Mr. Donahue argued in summation that Mr. Tabler had a "medical condition" and "could not control" his behavior. 29.RR.22, 30-31.

466. Nevertheless, counsel deficiently implemented their own strategy. They failed to conduct a background investigation, and thus of necessity never consulted with any expert about what it revealed. Even if they never looked closely at their client or discerned his unusual physical characteristics, a background investigation could have brought forward the evidence that Mr. Tabler had a history of developmental delay and never experienced the ordinary changes of puberty. They never consulted any expert about these signs. They never learned that Mr. Tabler's mother acknowledged, and others confirmed, that she drank during pregnancy, and so could not ask an expert how to investigate whether the exposure impaired his functioning. And they left their experts vulnerable to withering cross-examination, and the prosecutor's summation derision, because they never provided the experts with the many, many first-hand accounts that substantiated the diagnoses of borderline personality disorder, bipolar disorder, and attention deficit disorder found in the records.

2. Petitioner Was Severely Prejudiced by Counsel's Deficient Performance.

467. Counsel's deficient preparation, consultation, and presentation of expert testimony prejudiced Mr. Tabler's penalty phase defense. A reasonably complete mental health investigation and presentation could have provided support for their own experts and

developed the contributions of experts who could have established his undiagnosed Klinefelter Syndrome and Fetal Alcohol Spectrum Disorder. All could have traced the impact of Mr. Tabler's many disorders across his lifetime, and explained their relationship with his severely impaired functioning. They could have provided rebuttal to the government's portrayal of him as a conscienceless sociopath. Expert testimony could have helped the jury understand Mr. Tabler and his behavior in three-dimensional terms instead of leaving them to work with the prosecution's flat caricature while deciding his fate.

468. First, if trial counsel had conducted a background investigation they could, at a minimum, have learned of firsthand accounts by numerous witnesses who could have substantiated the diagnoses reflected in his records (on which their own experts relied), and could have established that he went through life burdened by one impairment superimposed on another. Mr. Tabler's mother, his brothers, his sister, his mother's friend, his sister's friend, Mr. Tabler's friend and the friend's parents, three elementary school teachers and two elementary school administrators, two elementary school classmates, a child psychiatrist who treated him for eighteen months, two of his mother's boyfriends, and two of his own girlfriends could all have described specific behaviors they personally witnessed:

- Age-inappropriate tantrums and impulsive outbursts;
- Parental neglect and abusive discipline;
- Extreme neediness and socially inappropriate behavior;
- Severe attention deficits;
- Wild mood swings; and
- Head injuries.

If trial counsel's experts could have relied on evidence from these witnesses to support their diagnoses, their opinions could have withstood cross-examination.

469. Instead, trial counsel's failure to provide a reasonably thorough background investigation to their experts severely undercut their credibility on the witness stand. For example, Dr. Proler admitted on cross-examination that he had not reviewed any records and could not say without further studies what the cause was of the abnormal brain waves he found on EEG exam. 28.RR.25-26. He told defense counsel on redirect that he could not say whether Mr. Tabler had brain damage without further tests. On recross-examination, the prosecutor insisted, "the answer to his first question is 'no,' correct?" The witness, and defense counsel, left the question hanging. 28.RR.27. Dr. Stone, on cross-examination, had to admit that she formed her opinion only the basis of a review of records and whatever Mr. Tabler told her, and that she had not spoken to any family members. She agreed with the prosecutor that the only background information supplied by counsel was "basically an outline," "just a highlight of things." 28.RR.52-53.[67] Similarly, Dr. Jacobvitz admitted that she had not verified information Mr. Tabler had given her. 28.RR.135.

470. Both Dr. Proler and Dr. Stone heavily qualified their original opinions. Dr. Proler testified that the quantitative portion of the analysis in his EEG report was "probably not admissible." 28.RR.21. Dr. Stone, unprepared with examples of symptoms and behavior to back up the diagnoses she had formed after an interview of an hour and a half, was forced to concede that the records reflected several diagnoses of conduct disorder and antisocial personality disorder along with the other diagnoses – borderline personality, bipolar, and

[67] The outline appears at A772. It is a chronology prepared by mitigation investigator Byington from records, supplemented with a few entries derived from his one meeting with Lorraine Tabler. Counsel did not provide Dr. Stone with a written statement from Ms. Tabler; the only details from her available to Dr. Stone were the entries in the chronology.

attention deficit disorders – on which she had relied. 28.RR.64-76. Defense counsel went beyond qualification to complete retreat in summation, embracing the testimony of the prosecution expert, Dr. Coons, and describing his client as a "sociopath," while still arguing that "he has an abnormality in his left frontal quadrant." 29.RR.21-22. The prosecutor made vigorous use of the concession.

> All of a sudden today it doesn't make any difference what the doctors said. It doesn't make any difference that Bucky tells you that Susan Stone says that he's got all the traits of antisocial personality disorder. That's not what she said. That was not what she said at all. They would like for you to believe all that because we're going to kind of change horses in mid stream.

29.RR.36.

471. But for counsel's deficiencies, their experts could have answered the question, "Does he have brain damage?" with an unequivocal "yes." *See* A620, 634. Counsel could have supported their own strategy of showing an "abnormal brain" with both firsthand observations and informed expert testimony, and would have no reason to abandon their strategy in favor of the prosecution's strategy in summation.

472. A similar turn of events led the Court of Appeals to find prejudice in *Walbey*:

> We are also convinced that, unlike the defense's psychiatric testimony in *Williams,* which, according to the Supreme Court's account of it, appeared neither to hurt nor help the case, Dr. Wills did severe damage to Walbey's case. He testified that Walbey could be diagnosed with anti-social personality disorder (an aggravating diagnosis), even though he did not believe that to be correct. Ezell did not seek on redirect to rehabilitate Dr. Wills; and, despite his awareness that the state would try to paint Walbey as a sociopathic monster, Ezell made no effort to prepare Dr. Wills for this line of questioning. Both Dr. Wills's explanation for the crime and his testimony that Walbey would do it again under the same circumstances were highly prejudicial, particularly coming from a defense witness. This likely explains why the TCCA cited his testimony as evidence of Walbey's future dangerousness. Dr. Wills now admits to feeling embarrassment over how poorly prepared to testify he felt. Considered together, it is undeniable that the mitigating evidence omitted by Ezell during Walbey's sentencing overwhelms the "scant" evidence, "bereft in scope and detail," that was presented.

309 F. App'x at 803-04.[68]

473. The prejudice caused by the deficiencies of Mr. Tabler's counsel, however, went much deeper than merely leaving their experts awkwardly hanging on cross-examination for want of firsthand corroboration of their opinions. Counsel never even learned that Mr. Tabler was handicapped from the womb with an endocrine system and central nervous system that crippled his ability to regulate his conduct, control his emotions, relate to others normally, pay attention, or succeed in school. As a result he was at heightened risk for secondary disabilities that, in his case, included substance abuse, other mental health problems, dependent living, poor work history, and confinement.

474. Because trial counsel had no idea of the truth, their experts had no idea of the truth either. The jurors, in turn, never knew that behind the chaotic upbringing sketched by the defense experts lay medical illnesses with roots in Mr. Tabler's biology and his genes. The picture they received at the penalty phase was inaccurate and incomplete.

475. There is a reasonable probability that if the jurors had understood that Mr. Tabler has a genetic disorder, about which he had no choice, and another congenital disorder, about which he had no choice, and that these medical illnesses exponentially magnified the impact of the many tough blows his life has dealt him, they would have appreciated the claims of mercy in this case, and would have imposed a life sentence. This Court should accordingly grant the writ on this ground.

C. Trial Counsel Was Ineffective For Failing To Adequately Prepare Expert Witnesses To Testify At The Penalty Hearing.

476. Trial counsel's deficiency respecting his experts was not limited to failing to provide them with social history information. Even in light of the records in his possession, he

[68] *See also Sears*, 130 S. Ct. at 3267; *Porter*, 130 S. Ct. at 454; *Adams*, 324 F. App'x at 351.

failed to adequately prepare his mental health witnesses to testify, failed to rehabilitate them with available evidence, and allowed the prosecutor to impeach their credibility with irrelevant and prejudicial cross-examination.

477. It is not sufficient for counsel to merely retain and present expert testimony. Effective counsel must adequately prepare expert witnesses and effectively present their testimony. *See Walbey,* 309 F. App'x. at 803 (counsel ineffective when he failed to adequately prepare mental health expert to testify and failed to rehabilitate expert when State elicited on cross-examination that the defendant could have ASPD which was an aggravating diagnosis); *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007) (counsel retained expert shortly before trial, did not explore or test the basis for the expert's opinion, and thus, failed to take the requisite reasonable steps to present favorable expert testimony to the fact finder).

478. Mr. Tabler's counsel fell short of this standard. For example, during Dr. Proler's examination, counsel failed to object to the damaging and irrelevant cross-examination that Dr. Proler conducted a quantitative profile of the EEG on Mr. Tabler. Dr. Proler's opinion that Mr. Tabler's EEG reflected abnormal brain activity in the left temporal region was based solely on his reading of the objective EEG and not in any way based on a quantitative profile. 28.RR.21. On cross-examination, Dr. Proler admitted that a quantitative EEG is "probably not admissible." *Id.* Counsel should have precluded this line of inquiry through a motion *in limine* or a prompt objection because it exceeded the scope of direct examination, and was irrelevant, confusing to the jury, and prejudicial. At the very least, counsel should have adequately rehabilitated Dr. Proler on re-direct examination by having him fully explain: (1) the difference between an "objective" EEG and a "quantitative" EEG; (2) that any controversy surrounding quantitative profiles of an EEG in no way applied to or affected an objective

reading of an EEG; (3) that an objective EEG is a test with longstanding credibility and acceptance in the medical community; and (4) his opinion was not based on any quantitative analysis but was limited to his reading of the objective EEG.

479. Counsel's inadequate preparation and presentation of Dr. Stone was even more problematic. On cross-examination, Dr. Stone's credibility was repeatedly undermined when she was unable to identify the records she relied on for her opinion that Mr. Tabler had ADHD. The prosecutor also suggested that none of Mr. Tabler's school records reflected a diagnosis of ADHD. Counsel failed to establish on re-direct examination the numerous records, in his possession, which supported Dr. Stone's opinion. In the records from Psychiatric Medical Group, Richard's father reported that his son had difficulty in school with listening, was easily distracted and hyperactive, and was a "clown" in the classroom. A685-92. These records also reflected that Richard's treating physician, Dr. Henigan, administering the T.O.V.A. (a neuropsychological test specifically developed for the screening and diagnosis of neurologically based attention deficits) to Richard and his scores were "off the charts" for attention deficit problems. *Id.*. Moreover, Richard's school records from Clark County Nevada documented that Richard had ADHD and was taking Wellbutrin. A695.

480. The prosecutor also challenged Dr. Stone's conclusions that Mr. Tabler suffered from bi-polar disorder and borderline personality disorder by suggesting that Mr. Tabler's mental health records reflected he was more consistently diagnosed with ASPD. 28.RR.66-68, 76. Effective counsel would have asked Dr. Stone to identify and discuss each of the numerous instances in the records in which Mr. Tabler exhibited behaviors consistent with her diagnosis and received a consistent diagnosis by prior clinicians. *See*, *e.g.*, A801 (*Lee County Correctional Records* 9/26/03 - Bi-Polar Disorder NOS; 9/25/03- Bi-polar disorder, borderline

personality disorder); A7008 (*Stanislaus County Mental Health Records*; 6/3/99-"Client brought to ES by two church friends/deacons after he told them he felt suicidal . . . four days ago he took horse steroids in an attempt to [commit] suicide when this failed he held a gun to his head and put it down.," 12/7/95-"Patient found to be depressed, out of control, cut self superficially many times on [left] arm,"); A835-46 (*California Department of Corrections Records*: (1) 8/2/01 - diagnosis on admission, Axis I: bipolar disorder, Axis II: borderline personality disorder with antisocial and narcissistic features; (2) 10/3/01-Final DSM-IV-TR diagnosis, Axis I, bi-polar disorder NOS, Axis II, borderline Personality Disorder; (3) 5/1/01- "I'm stressing out real bad, just hate life, maybe crying for help, I guess." (4) 5/15/01- Recent history of self-mutilation requiring 5pt restraints; (5) 10/3/01-" I know that I need help, I'm screwed up. I have mood swings" (6) 1/20/03-"Mr. Tabler was brought up from R&R to this unit on 1/15/03. He had presented in R&R with multiple scratches and cuts on his forearms, self-inflicted by a razor . . . he stated he has a history of cutting himself to relieve feelings of emptiness").

481. Dr. Stone was woefully ill-prepared to address the prosecutor's assertions that Mr. Tabler had ASPD. On cross-examination, she stated that she did not recall that Mr. Tabler had been diagnosed with ASPD. 28.RR.68. Competent counsel would have known that this would be the prosecutor's primary attack on cross-examination and made sure that she was familiar with all of the prior diagnoses and prepared to explain why the ASPD and conduct disorder diagnoses were incorrect. Dr. Stone weakly stated on re-direct examination that she rejected ASPD because Mr. Tabler's behaviors could be explained by his biologic mental health disorders. *Id.* at 81. Counsel could have buttressed this assertion by pointing Dr. Stone to the general diagnostic criteria for a personality disorder in the DSM-IV-TR which *requires* a

clinician to reject a personality disorder when the "enduring pattern (of inner experience and behavior) is not better accounted for as a manifestation or consequence of another mental disorder." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Text Revision, 689 (4th ed. 2000).

482. The prosecutor also discredited Dr. Stone's testimony that Mr. Tabler had repeated the third grade when he established that the school records did not reflect this fact. 28.RR.60. This left the jury with the impression that Dr. Stone was mistaken in her belief that Richard struggled in school and that her analysis of the records was, at best, careless. On re-direct examination, counsel failed to rehabilitate Dr. Stone by introducing the school records which showed that Richard consistently received poor grades, had behavioral problems, and numerous absences. *See* A445-50; A538-42.

483. Dr. Stone's opinion that Mr. Tabler's family life was neglectful was discredited by the prosecutor when he established that she had not interviewed anyone in Mr. Tabler's family. Counsel either failed to provide her with the report and family interviews conducted by Dr. Jacobvitz or he did provide them to her and failed to establish on re-direct examination that this supported her opinion.[69] Under either scenario, counsel was ineffective.

484. Finally, the prosecutor questioned Dr. Stone about why she had not turned over her notes. 28.RR.65. Insinuating that the defense and/or Dr. Stone was withholding information, the prosecutor asserted that she was aware that the State was entitled to her notes but she had nonetheless failed to turn them over. *Id.* Then, the prosecutor asked the judge to order Dr. Stone to turn over her notes when she returned to the office, further suggesting to the

[69] Of course, had counsel adequately conducted the independent social history investigation required by the Sixth Amendment, Dr. Stone would have had ample anecdotal support for her opinions.

jury that Dr. Stone and/or the defense was not compliant with court rules or otherwise maliciously withholding information. *Id.* at 86. Counsel should have promptly objected to this being addressed in front of the jury, and asked to discuss this issue at sidebar or in chambers.[70]

485. Likewise, Dr. Jacobvitz's opinion that Richard had been neglected and abandoned by his father was discredited when the prosecutor confronted her with select portions of letters written by Mr. Tabler's father which gave the impression that he was concerned about his son's welfare. First, counsel failed to litigate a motion in *limine* to exclude these letters as inadmissible hearsay as it was not clear that these were documents which she relied upon to form her opinion. Second, counsel failed to elicit the cold and harsh comments also contained in those letters. In one letter to his son, who was seventeen at the time, Robert Tabler told him: "YOUR BEHAVIOR IS ROTTEN TO THE CORPS!!" A705 (Letter from Robert Tabler). In this same letter his father told Richard (age 17), that he was *on his own* for six months. In a subsequent letter he told his son; "I need to move forward with my life and our past relationship causes too much turmoil for me, affects my work/earnings/health and relationships with everyone I am in contact with." A708.

486. Mr. Tabler was prejudiced by counsel's failure to adequately prepare his expert witnesses. Counsel's entire theory at sentencing was that his client was not "normal." Counsel's failure to prepare and rehabilitate his experts prevented the jury from fully understanding the extent of Mr. Tabler's longstanding and debilitating mental illnesses. Without this detailed testimony, supported by records, the jury was left to conclude that Mr. Tabler was simply a manipulative sociopath. There is a reasonable probability that, but for counsel's deficiency, alone and in combination with the other deficiencies in this pleading, the

[70] If counsel failed to provide these notes during the discovery process then he was in violation of local rules regarding discovery.

outcome of Mr. Tabler's penalty trial would have been different. This Court should therefore grant habeas relief on this ground.

D. Mr. Tabler Was Denied Effective Assistance Of Counsel And Reliable Sentencing Because Trial Counsel Failed To Rebut Or Otherwise Mitigate The Evidence Introduced To Support Future Danger Under Art. 37.071, § 2(B)(1).

487. At Mr. Tabler's sentencing hearing, trial counsel failed to rebut or otherwise mitigate the evidence the State introduced to prove "beyond a reasonable doubt that there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). Such rebuttal and mitigating evidence was readily available, yet trial counsel failed to discover and present it to the jury. As a result, the jury concluded that Mr. Tabler posed a continuing threat to society and found no mitigating circumstances warranting a sentence of life imprisonment. 29.RR.62. Accordingly, Mr. Tabler was denied effective assistance of counsel and reliable sentencing.

1. The Evidence Presented by the State to Prove Future Danger

488. To prove that Mr. Tabler presented a future danger and was therefore deserving of the death penalty, the State offered evidence of several instances of prior conduct. The State called Officer Jeff Hilliker from the Carson City Police Department in Carson City, Michigan. He testified that he investigated the burglary of a home in Carson City in July of 2004. 25.RR.39-40. As part of his investigation he interviewed Scott Nash, Lisa Wagner, and her parents who all advised him that they had observed Mr. Tabler in possession of two guns (a 9mm and .45 caliber) during the summer of 2004. *Id.* at 41. Officer Hilliker was not asked, and did not explain, how he made a link between the guns seen in Mr. Tabler's possession and the ones taken in the burglary.

489. Detective Hilliker further testified that Mr. Tabler traveled to California from Michigan with Mr. Nash (age 20 in 2004) and Lisa Wagner (age 19 in 2004) in a vehicle stolen from a car lot. *Id.* at 42. Officer Hilliker obtained a cell phone number for Mr. Tabler and left him a message. *Id.* A person identifying himself as Richard Tabler returned the call and, after being questioned about the stolen guns, denied knowledge of their whereabouts. *Id.* at 43. Later, a person identifying himself as Richard Tabler made several calls to Officer Hilliker, at one point asking to work out a deal on the charges, and at another point threatening the officer if he did not drop the investigation. *Id.* at 44. Eventually, Officer Hilliker learned of Mr. Tabler's arrest in Texas and made no efforts to arrest him on the charges. *Id.*

490. Through a series of open-ended questions on cross-examination, counsel elicited additional, unfavorable, and hearsay-based testimony about Mr. Tabler and the incident in Michigan. Officer Hilliker told the jury that: (1) Mr. Tabler had tried to give the guns to Lisa Wagner's father; (2) Mr. Tabler's father gave Richard three hundred dollars for the gun because "he felt he knew that [he] was dangerous with it;" (3) Mr. Tabler lived a transient lifestyle while in Michigan, "never really stay[ing] in one place too long." 25.RR.46

491. Had trial counsel adequately investigated this incident and interviewed Lisa Wagner, they would have learned that she cared deeply for Mr. Tabler and described him as a kind person who struggled with his mental health problems. A467. She observed Mr. Tabler suffer from dramatic mood swings and on a number of occasions Mr. Tabler told her that he knew he was unstable and he hated this about himself. *Id.* She has been living in Michigan all of her life and if she had been contacted by any lawyer working on Mr. Tabler's behalf at the time of trial she would have testified on his behalf at sentencing and asked the jury to spare his

life. Likewise, she would have provided this same information to any lawyer representing Mr. Tabler in any post-conviction appeals. *Id.*

2. Counsel Was Ineffective.

492. It was counsel's obligation to investigate the circumstances of the State's case in aggravation, and uncover any facts that would serve to rebut or mitigate the State's evidence. As the United States Supreme Court explained in *Rompilla v. Beard*, 545 U.S. 374 (2004):

> With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.

Id. at 385-86 (footnote omitted).

493. Trial counsel was ineffective. Not only did counsel fail to do any investigation of this incident by interviewing available witnesses, he actively harmed his client by introducing inadmissible and damaging evidence. Effective counsel would have objected to Officer Hilliker's testimony that Mr. Tabler was seen in possession of stolen guns because there was no foundation established that these were the same guns stolen in a burglary. At a minimum, counsel should have cross-examined Officer Hilliker and established that Ms. Wagner, her parents, and Mr. Nash were not acquainted with the victim of the burglary, were not familiar with the items stolen and had no personal knowledge of the origin of the guns they

observed in Mr. Tabler's possession. Effective counsel would have interviewed Ms. Wagner and presented her testimony at sentencing.

494. There was no reasonable basis for trial counsel's failure to present this mitigating evidence. Trial counsel's failure to do so did not advance Mr. Tabler's interests. And no tactical reason justified these failures because trial counsel's actions were not informed by a reasonable investigation. *Strickland*, 466 U.S. at 690-91. Decisions made without a reasonable investigation can never be deemed strategic or tactical. *See, e.g.*, *Williams*, 529 U.S. at 396 (noting that "the failure to introduce ... evidence ... was not justified by a tactical decision .... Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation ....").

495. As a result of counsel's failures, Mr. Tabler was prejudiced. Ms. Wagner's testimony could have humanized Mr. Tabler by showing that he had a kind and caring side to him and that he struggled with his own mental health problems and felt badly about his inability to manage his mental illness. Moreover, had counsel lodged the appropriate objection, he could have precluded the evidence of the weapons altogether.

496. Because trial counsel failed to rebut or otherwise mitigate the Commonwealth's evidence used to support future danger, Mr. Tabler was denied effective assistance of counsel and reliable sentencing in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. There is a reasonable probability that, but for counsel's deficiency, alone and in combination with other deficiencies set forth in this pleading, the jurors would have voted for life. This Court should therefore grant habeas relief on this ground.

E. Defense Counsel Was Ineffective For Failing To Object To The Admission Of Unadjudicated Offenses In Violation Of Due Process And The Heightened Reliability Requirements Of The Eighth Amendment; Appellate Counsel Was Ineffective For Failing To Raise This Record-Based Claim.

497. At the penalty phase, the State presented testimony and argument about numerous prior criminal acts attributed to Petitioner, although he had never been convicted of any of them nor charged with most of them. The State also repeatedly relied on inadmissible hearsay evidence in support of these prior acts. The State's admission of these unadjudicated offenses and its use of hearsay violated Petitioner's Eighth Amendment right to reliable capital sentencing, his Fourteenth Amendment right to due process, and his Sixth Amendment right to Confrontation. Appellate counsel was ineffective for failing to raise this record-based claim on appeal. Petitioner's sentence must be vacated.[71]

1. The Allegations and Argument Presented at Trial.

498. The prosecution presented evidence and argument regarding several uncharged or unadjudicated incidents.

499. Most significantly, the prosecution introduced evidence about the unadjudicated homicides of two Teazer's dancers, Amanda Benefield and Tiffany Dotson. The jurors saw a videotape of the crime scene and heard testimony regarding the discovery of the bodies of the two women. 26.RR.55. The prosecution presented testimony from the medical examiner who performed the autopsies that Tiffany Dotson died of two gunshots wounds to the head, and that Amanda Benefield died of six gunshot wounds to her torso and arm. 26.RR.88-106. A ballistics expert concluded that bullets from the same gun had killed Zayed and Rahmouni and the two women. 26.RR.136. Kim Geary testified that Mr. Tabler had told her that he had shot

[71] While trial counsel raised numerous pre-trial motions challenging the constitutionality of Article 37.071, and requesting notice of other crimes evidence, counsel unreasonably failed to preserve for appeal the challenges raised in this claim.

the women because they had been telling people he had shot Zayed and Rahmouni. 26.RR.141.

500. The State also presented testimony regarding an incident an incident in which Mr. Tabler allegedly attempted to escape custody following an arrest for a parole violation. 25.RR.10–31. The State presented evidence that Mr. Tabler was arrested on the parole violation and jumped out of the car as the parole agent was transporting him. 25.RR.28. He was re-arrested a short time later by police. While in a patrol car, he allegedly started kicking the windows. 25.RR.14 and 29. At that point, Petitioner was placed in a "wrap device" to secure him and he was again being transported to the station. 25.RR.15. Mr. Tabler allegedly freed himself from the wrap device and kicked out one of the windows to the patrol car while it was en route, attempting to get out of the car. 25.RR.16-17. According to police, he was unsuccessful and was then placed in a police wagon for transport. 25.RR.17. Counsel failed to object to this evidence.

501. The State presented completely tenuous evidence that Petitioner burglarized a home and stole guns in Michigan. 25.RR.39-51. A Carson City police officer was permitted to testify that there had been a "second degree home invasion" in which guns had been taken from the home. 25.RR.40. He also testified that he spoke to Petitioner by telephone sometime thereafter and that Petitioner threatened him and later left several threatening messages. 25.RR.43-44. Petitioner has never been charged or convicted of any crimes in relation to this alleged incident.

502. The State was also permitted, without objection, to admit multiple pieces of evidence that Petitioner had made threats to various individuals in law enforcement. 25.RR.53-74. For example, one of the jailers at the Bell County sheriff's office testified that he heard

Petitioner talking to another inmate about hurting officers in the jail and that he wanted to kill a particular officer. 25.RR.53. Again, Petitioner was never charged or convicted of any crimes in relation to these allegations.

503. The admission of these unsubstantiated and unadjudicated offenses does not comport with the heightened requirements of reliability inherent in the Eighth Amendment. Additionally, the jury's consideration of this evidence violated due process. The defense unreasonably failed to contest these allegations of extraneous offenses, and appellate counsel was ineffective for failing to raise this on appeal.

2. Hearsay Evidence.

504. The State was also repeatedly, and without objection, permitted to present devastating hearsay evidence to the jury. For example, during the testimony of the parole agent, who testified that Petitioner escaped from him after arresting him for a parole violation, the agent was permitted to testify that while Petitioner "was in custody at the California Department of Corrections, he had notified a social worker there when he gets out he was going to take care" of the agent and his family. The "social worker" was never called to testify. Counsel failed to object to this out-of-court statement, which was clearly admitted for the truth of the matter – to establish future dangerousness. The admission of this evidence violated Petitioner's Confrontation Clause rights.

505. Additionally, during the presentation of evidence regarding the alleged burglary and theft of guns, multiple inadmissible pieces of hearsay were admitted. Officer Hilliker was permitted to testify that the homeowner "advised [him] that the guns had been missing," and also told him the caliber of the weapons. 25.RR.41. He was also permitted to testify that two other individuals told him that they had taken a trip with Mr. Tabler to California after they had

taken a truck from a car dealership, additional alleged criminal activity that was never proven or adjudicated. Counsel unreasonably failed to object to this evidence.

506. The admission of these multiple pieces of hearsay evidence further calls into question the reliability of the death sentence. Trial counsel was ineffective for failing to object and appellate counsel was ineffective for failing to raise these issues on appeal. There is a reasonable probability that counsel's deficient representation had an effect on the outcome, alone and in combination with the other deficiencies set forth in this petition. Petitioner is entitled to a new penalty phase.

F. Trial And Appellate Counsel's Failure To Challenge Inadmissible Victim Impact And Victim Character Evidence Relating To Victims Not Named In The Indictment Deprived Petitioner Of The Effective Assistance Of Counsel

1. Mr. Tabler's Due Process Rights were Violated When the Prosecution Introduced Extraneous Victim Impact and Victim Character Evidence

507. Mr. Tabler was not charged with the killings of Amanda Benefield or Tiffany Dotson. Despite that, the prosecution elicited extensive emotional victim impact and victim character evidence relating to Ms. Benefield and Ms. Dotson. This extraneous evidence was clearly inadmissible under Texas law.

508. In *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), the Supreme Court explained that if the prosecution presents victim impact or victim character evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair[,]" it violates a defendant's due process rights. Texas has defined victim character evidence as "evidence concerning the good qualities possessed by the victim" and victim impact evidence as "evidence concerning the effect that the victim's death will have on others, particularly the victim's family members[.]" *Adams v. Thaler*, 421 F. App'x 322, 333, 2011 WL 1304894 (5th Cir. March 31, 2011) (citations and quotations omitted). Texas law makes clear that admitting victim impact and victim character

testimony relating to a victim not named in the indictment is the type of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) (explaining "danger of unfair prejudice to a defendant inherent in the introduction of 'victim impact' evidence with respect to a victim not named in the indictment . . . is unacceptably high"); *see also Adams*, 421 F. App'x at 334.

509. In *Cantu*, the Texas Court of Criminal Appeals held that it was error to admit victim impact testimony from the mother of a victim not named in the indictment because it was extraneous to the crime charged. *Cantu*, 939 S.W.2d at 637. Like the error in *Cantu*, the prosecution in Mr. Tabler's case introduced victim impact and victim character evidence relating to Ms. Benefield and Ms. Dotson, even though Mr. Tabler was not charged with their killings.

510. Ms. Benefield's grandmother, Carroll Vaughn, testified to Ms. Benefield's victimization as a child and to her good character. First Ms. Vaughn told the jury that Ms. Benefield's "step father raped her . . . [and] left her in a tub of blood for dead which he is now serving a life sentence with no parole."[72] 26.RR.67. The prosecutor then elicited the following victim character evidence:

> Even though everything that Amanda Kay went through, she was . . . a happy girl. She loved life . . . But I think all Amanda Kay ever really wanted was to love that she never had. And to me that's what she was searching for, all of her life was this love. And I think it's so sad the life she lived as a brutal death that she had.

26 R.R. 71.

511. Immediately following Ms. Vaughn's testimony, the prosecution presented Ms. Dotson's step-mother, Mary Dotson, and elicited victim impact and victim character evidence

[72] Trial counsel was also ineffective for failing to object to Ms. Vaughn's recitation of Ms. Benefield's step-father's "life sentence." Ms. Vaughn repeated that Ms. Benefield's step-father was serving a life sentence. 26.RR.68. This violated Mr. Tabler's rights to the effective assistance of counsel and to individualized sentencing in a capital case.

related to Ms. Dotson. First, the prosecutor elicited testimony from Mary Dotson that Ms. Dotson was an "outgoing, fun-loving child" and that "[s]he was a big animal lover . . . she would bring an animal home and want to keep it, and I'd say, you know we already got two dogs and three cats, sorry. And she'd get all mad but . . . she loved us and looked up to us." 26.RR.78. Mary Dotson then testified to the effect of Ms. Dotson's death on her family: "[s]he was the love of our life. I called her the daughter of my heart." 26.RR.78. Mary Dotson continued that when she was informed that Ms. Dotson was killed "it was the nightmare that parents have when you let your children go out and – and go. And sometimes bad things happen and this is – that was the worst. It was horrible." 26.RR.81. Mary Dotson explained that Ms. Dotson's death affected an entire community: "[t]he church that we had her funeral at was packed. There was standing room only." 26.RR.80.

512. The prosecution's presentation of this prejudicial extraneous victim impact and victim character evidence violated Mr. Tabler's due process rights under the Fourteenth Amendment to the United States Constitution. *See Cantu*, 939 S.W.2d at 637 (explaining that "such evidence serves no purpose other than to inflame the jury."). Despite this clear error of constitutional magnitude, Mr. Tabler's counsel failed to object to its admission.

2. Trial Counsel Was Ineffective For Failing To Object To This Prejudicial And Inadmissible Evidence.

513. Mr. Tabler was denied the effective assistance of counsel because trial counsel failed to object to the prosecution's presentation of extraneous victim impact and victim character evidence. Counsel's performance is deficient where it fails to "research relevant facts and law, or make an informed decision that certain avenues will not be fruitful." *United States v. Conley*, 349 F.3d 837, 841 (5th Cir. 2003) (citation and quotations omitted). To that

end, counsel has a duty to raise meritorious objections "based on directly controlling precedent[.]" *Id.*

514. At the time of Mr. Tabler's trial, *Cantu* established that extraneous victim impact and victim character evidence was inadmissible under Texas law. Counsel, however, failed to object to the prosecution's presentation of such evidence. That was deficient performance.

515. Counsel's deficient performance prejudiced Mr. Tabler. It is reasonably probable that the jury sentenced Mr. Tabler to death based, in part, on the testimony of Mary Dotson and Carroll Vaughn. Had counsel objected to the improper questioning, that objection would have been sustained and the jury would have never heard about the good character and the tragic lives of Ms. Benefield or Ms. Dotson. Additionally, the jury would have never heard about how Ms. Dotson's killing profoundly affected her family and her community in negative ways. This is precisely the reason that the court in *Cantu* found this type of evidence to be unduly prejudicial. Because counsel's performance was deficient and because that performance prejudiced Mr. Tabler, both individually and in combination with other deficiencies in this pleading, he is entitled to a new sentencing proceeding under the Sixth and Fourteenth Amendments.

G. Trial Counsel's Failure To Develop And Present Evidence About The Low Probability That Petitioner Would Be Paroled If He Received A Life Sentence Deprived Petitioner Of His Rights To Due Process, Fair Trial, Effective Assistance Of Counsel, And His Rights Under The Eigth Amendment.

516. Despite knowing that the only basis on which the State would seek the death penalty was future dangerousness under Tex. Code Crim. Proc. art. 37.071, trial counsel failed to protect Petitioner's rights to due process, fair trial, effective assistance of counsel and his rights under the Eighth Amendment by failing to develop and present evidence to the jury that

if given a life sentence, it was highly unlikely that Petitioner would be paroled at the statutory minimum of forty years.

517. In the case at bar, the trial court instructed the jury as follows:

> Under the law applicable in this case, if the defendant is sentenced to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life, the defendant will become eligible for parole, but not until the actual time served by the defendant equals 40 years, without any consideration for good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

29.RR.12.

518. Trial counsel failed to present any evidence showing the great likelihood that Petitioner would serve well over forty years if he received a life sentence. Statistics from the Board of Pardons and Parole show that in 2008 there were 1,976 inmates serving a life sentence for capital murder, and of those inmates five inmates, or .25% had been released on parole since 1995. *See* A1010.

519. Trial counsel was well aware that jurors are often confused by the court's instructions. *See* I.CR.251-53 (trial counsel's objections to jury charges he found to be confusing and misleading)). Counsel had no reasonable strategy for failing to present evidence to clarify the jury's confusion about whether and when Petitioner would likely be paroled.

520. Here, the jury reasonably may have believed that Petitioner would be released in forty years if he were not executed. In reality, it was highly unlikely that Petitioner, age twenty-five at the time of the crime, would be paroled once his forty-year minimum was up. To the extent that the jury's misunderstanding of when Petitioner would likely be released on parole, the jury faced a false choice between sentencing Petitioner to death and sentencing him to a period of incarceration that would allow for his release while he was in his mid-sixties.

This misperception was enhanced both by the trial court's refusal to instruct the jury about its option of a sentence of life without parole, which was available at the time of Petitioner's trial, and the prosecutor's repeated argument that Petitioner would present a future danger to society if he were not executed. The result of this doubly enhanced misperception is a death sentence secured on the idea that Petitioner posed a future danger without the jury understanding the reality of a life sentence. Trial counsel's error denied Petitioner due process of law.

521. The United States Supreme Court in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), held that the Due Process Clause of the United States Constitution does not allow the execution of person "on the basis of information which he had no opportunity to deny or explain." *Id.* In *Gardner*, the defendant was sentenced to death based on a presentence report that he did not possess and therefore, did not have the opportunity to rebut. Here, due to counsel's ineffectiveness, the jury in this case had no explanation of how highly unlikely it would be for Petitioner to be paroled in forty years.

522. Further, counsel's failures violated Petitioner's rights under the Eighth Amendment since presentation of such evidence was mitigating because it could provide the jury with a basis for a sentence less than death. *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In *Skipper*, the Court held that evidence of the defendant's good behavior was admissible under the Eighth Amendment because it was relevant mitigation evidence. *Skipper*, 476 U.S. at 4.[73] Here, evidence of the miniscule chance of Petitioner's being paroled in forty years would have provided the jury with a basis for sentencing him to life rather than death. Due to counsel's failure to present this evidence, Petitioner was prevented from rebutting information about future dangerousness that the jury

[73] The *Skipper* Court also held that the lower court's refusal to allow such evidence was a violation of the defendant's rights under the Due Process Clause. *Id.* at 5 n.1.

used as the basis for their death verdict. Because the jury never heard this relevant mitigation, there is a diminished reliability regarding the jury's determination that death was the appropriate punishment. *See Beck v. Alabama*, 447 U.S. 625 (1980).

523. The prosecutor emphasized future dangerousness and urged the jury to sentence Petitioner to death so he would not be a danger to the public if he was released. *See, e.g.,* 29RR.41 ("He is a future danger whether he is at TTG Electric, whether he's at Stillhouse Park, whether he's in Modesto, California …"). As the Supreme Court has stated, "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant." *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994). Again, counsel was ineffective for failing to do so. Given the central role of the future danger question under the Texas sentencing scheme, the jurors' misperception of the likelihood Petitioner would secure release would have had a devastating impact on their decision. There is a reasonable probability that, but for counsel's deficiency, alone and in combination with other deficiencies in this pleading, the jurors would have chosen life. This Court should therefore grant habeas relief on this ground.

H. Petitioner Was Denied His Right To Effective Assistance Of Counsel When Counsel Failed To Lodge A Single Objection To The Prosecutor's Improper Closing Argument.

1. Introduction

524. The penalty phase closing of trial prosecutor Paul McWilliams is a case study in improper argument. Over the course of his closing, the prosecutor: argued facts not in evidence to ridicule defense witnesses; made burden-shifting arguments that faulted the defense for not presenting certain mitigating evidence; instructed the jurors to ignore the entire

defense case in mitigation because it did not tie in directly to the crimes of conviction; and argued, in light of the supposed lack of legitimate mitigating evidence, that a death sentence was required, thereby improperly lessening the jury's role. The prosecutor's comments violated Petitioner's rights under the Eighth and Fourteenth Amendments.

525. Although the prosecutor's closing argument was improper essentially from start to finish, defense counsel failed to object even a single time. Counsel had no reasonable basis for failing to object to any of the prosecutor's arguments and Petitioner was prejudiced; the prosecutor's argument permitted the jury to disregard the entire defense case in mitigation. There is much more than a reasonable probability that Petitioner would not have been sentenced to death had counsel performed adequately. This is particularly true in light of the fact that the trial court did not give any instruction to cure the prosecution's improper argument. Counsel's failures violated Petitioner's rights under the Sixth Amendment.

2. The Prosecutor Repeatedly Argued Facts Not In Evidence.

526. During his closing, Mr. McWilliams repeatedly argued facts not in evidence to disparage defense witnesses. Mr. McWilliams's comments had no grounding in the record and were inappropriate and inflammatory.

527. With respect to defense expert witness Dr. Debra Jacobvitz, Mr. McWilliams offered the following commentary regarding her role in the case:

> But what's her other research project? Her other research project features you, folks, as the guinea pigs. She's [sic] was located by John Nyland with the Texas Defender Service. He recruited her to come up here and just start rambling about childhood development and neglectful childhood and things like that in the hopes, in the hopes that you folks will say, okay, that sounds like mitigation to me, so there it is. It's mitigating. That way if you folks buy into that she can get on the statewide testifying band wagon and travel from capital to capital trial and talk about the same things again and ignore facts and ignore evidence and not really care whether people lied to her or not.

29.RR.50.

528. There was nothing in the record to support Mr. McWilliams's comments. During her testimony, Dr. Jacobvitz simply stated that she had become involved in the case after being contacted by John Nyland from the Texas Defender Service. 28.RR.132 ("[B]asically he e-mailed me and told me that I had been recommended to him by George Holden who's a professor in psychology who studies maltreatment and abuse and so forth. And he asked me if I would be willing to take a capital trial – if I'd be willing to testify in a capital trial case.").

529. Dr. Jacobvitz stated multiple times that she knew little to nothing about the Texas Defender Service as an organization:

> Q: Okay, what do they do?
>
> A: I don't know very much about the Texas Defender Service.
>
> Q: Tell the jury what you do know about them.
>
> A: What?
>
> Q: Tell the jury what you do know about it.
>
> A: All I know is that he told me that a lot of people had been coming in and asking him if they could hire an expert witness and that he was looking for names. I know nothing else.
>
> Q: You don't know what the Texas Defender Service does?
>
> A: I know from George Holden that I asked actually if it was a legitimate group and he said yes.
>
> Q: I don't think anybody is contesting whether it's a legitimate group or not. Do you know what they do?
>
> A: No.

28.RR.133.[74]

[74] Defense counsel eventually objected to the prosecutor's attempts to continue this improper line of questioning during the cross-examination of Dr. Jacobvitz. 28.RR.133-34 ("Judge, I object to Mr. McWilliams testifying about what the Texas Public Defender or Texas

530. Dr. Jacobvitz additionally stated that she had never before testified in a capital trial. 28.RR.132.

531. There was no basis in the record for Mr. McWilliams's argument that Dr. Jacobvitz was conducting a study using the jurors as "guinea pigs." Nor was there any basis for the assertion that Dr. Jacobvitz was attempting to "get on the statewide testifying band wagon" to go around "rambling about childhood development and neglectful childhood" while "ignor[ing] facts and ignor[ing] evidence." This argument was improper and served only to belittle a significant defense witness.

532. Mr. McWilliams continued in a similar vein when discussing defense expert Meyer Proler during his closing argument, claiming that "[a]pparently the last case in Harris County some prosecutor apparently just skinned him and that's why he is somewhat reluctant to say much of anything on the stand." 29.RR.45. Again, there was no basis in the record for the assertion that Dr. Proler had been "skinned" by a prosecutor in a prior case in a different county, nor for the assertion that his experience in any prior case had made him reluctant to testify in Mr. Tabler's case.

533. A prosecutor "may not directly refer to or even allude to evidence that was not adduced at trial." *United States v. Mendoza*, 522 F.3d 482, 491 (5th Cir. 2008); *see also Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) ("one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial"). Improper prosecutorial commentary violates a defendant's constitutional rights when it has "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Mendoza*, 522 F.3d at 493 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The

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Defender Service is. If she doesn't know, she doesn't know. If he wants to show bias, she'd obviously have to know about it."). The Court sustained the objection. *Id.*

prosecutor's comments regarding these two defense expert witnesses, both standing alone and in conjunction with the rest of the prosecutor's argument, violated Petitioner's rights under the Due Process Clause.

3. The Prosecutor Repeatedly Made Burden-Shifting Arguments That Faulted Petitioner For Failing To Produce Mitigating Evidence.

534. A significant portion of the defense case in mitigation dealt with the destructive influences of Petitioner's father, Robert Tabler. Mr. McWilliams repeatedly commented on the fact that the defense never called Petitioner's father as a witness:

> The folks that spent, what did he say, five or $6,000 to bring Meyer Proler from Houston, Texas? They can't get Robert Tabler here? Sure they can. Sure they can. They brought Susan Stone. They brought Debra Jacobvitz. They can bring you anyone they want. They chose not to bring here Robert Tabler. They chose not to bring Shawn Tabler. And maybe that's because Robert and Shawn are like Susan Stone's notes, we don't want that to see the light of day in this courtroom. Think about that.

29.RR.36; *see also* 29.RR.43 ("Robert Tabler could have come here and told you that. But we don't know."); *id.* ("If Robert Tabler would have supported anything that was said he'd been here. You can take that to the bank, folks.").

535. A defendant has no duty to present evidence at either the guilt or penalty phase of a capital trial. To the contrary, it is solely the prosecution's responsibility to prove its case beyond a reasonable doubt at each phase of trial, and this burden never shifts to the defense. *See In re Winship*, 397 U.S. 358 (1970). As with the comments regarding Dr. Jacobvitz and Dr. Proler, these comments violated Petitioner's rights under the Due Process Clause.

4. The Prosecutor Repeatedly Instructed Jurors To Ignore Mitigating Evidence Because It Did Not Relate Directly To The Crimes.

536. By far the most substantial theme of Mr. McWilliams's closing was the erroneous argument that jurors must ignore all mitigating evidence that does not directly relate

to the crimes of conviction. Indeed, the final nine transcript pages of Mr. McWilliams's argument focus almost exclusively on this point. Mr. McWilliams began by stating:

> Well, their folks never tied it together. They never did. Ladies and gentlemen, that second question talks about not just circumstances. It talks about mitigating circumstances and to be mitigating, it has to mitigate something, doesn't it, or else it's just a word.
>
> Your charge says the jury shall consider mitigating evidence, be evidence that a juror might regard as reducing the defendant's moral blameworthiness. Well, his blameworthiness for what? I mean, it's not just a rhetorical question. It's his blameworthiness for his actions. You have to tie the two together.
>
> What the defense wants you to buy off on is that there's this bizarre notion of what mitigating is. Most of us don't deal with terms like mitigation much in the courtroom. You might be more familiar with it in terms of insurance coverage. Okay.
>
> Roof blows off of your house. You have generally a duty to mitigate any further damage which could be putting tarps up, things like that because roof blows off, there's a chance you may get water damage and some things like that.
>
> Well, here's what they want. They want somebody to be able to come in and tell their agent, well, here is what I did. After my roof blew off, I know I could have gotten some tarps and some things like that, but I put in a burglar alarm. Okay. That's good but it didn't do anything to stop the rain from coming in. Your burglar alarm is a circumstance. It is an added fact, but it didn't mitigate. It didn't change what happened later. It's something that lessens that blame, so it has to be tied to an event, folks.
>
> That's why bipolar was so important because as I said, if he was in a manic phase of bipolar, then maybe that is a mitigating circumstance. But there's no evidence of that. See?
>
> I mean, folks, he's not bipolar. Even if he is, even if you believe that, even if you believe that he's got a lesion on his brain, even if you believe that he had a horrible childhood, you've got to go to the next step.
>
> What it is about that that caused him to act this way? And therefore shouldn't be held as accountable for his actions? That's what they want you to ignore.
>
> You know, his mom said that he left, took her car with him. She went to bed sick. Woke up. Car – he's gone. Well, maybe. You know, Dr. Debra Jacobvitz could have gotten up and said, you know, he's acting out against his mother because she rejected him and that's why he stole the car. Bingo. Could be a mitigating

> circumstance as to stealing momma's car. They didn't say that. But see that's how it works. That is the way it works.
>
> You know, he's not accused – he's not convicted of threatening or murdering his parents. His childhood might be a mitigating circumstance if that were the crime, otherwise it's just a circumstance. And there is a difference.

29.RR.51-53.

537. Mr. McWilliams continued by rhetorically asking what aspect of Petitioner's case in mitigation was specifically tied to the crimes for which he had been convicted:

> What have you heard that in any of this evidence that reduces his blame for that? They have to be tied together, folks. There is absolutely no proof in this case at all of that. There is none.

29.RR.54.

538. Mr. McWilliams next argued at length that the specific mitigating evidence adduced by Petitioner was irrelevant because it had nothing to do with the crimes:

> That he had slow brain waves on a particular day in the jail is a circumstance. Okay. Doc, how did the slow brain waves cause him to pull the trigger in front of Tiffany's face? How did it do that? You don't have that evidence. Why? Because it has nothing to do with it. Zero. Nothing to do with it.
>
> Okay. Dr. Stone, how is it that this bipolar had anything to do with these actions? How did bipolar make him threaten Jeff Hilliker? How did bipolar make him do the things that he did? You have no evidence that it did. Even if you believe that he's bipolar, how did the fact that he's a sociopath make him do this? Dr. Coons was asked that directly by me. Says, just like everybody else. He chooses. It doesn't reduce his blame a bit because he makes those choices. He's capable of doing it and he does it.
>
> Dr. Jacobvitz, how about you? How about you? Tell us how his neglectful childhood, if we believe that, how did that cause him to shoot Amanda the number of times that he did? Tell us what part of it or take them all together, Dr. Jacobvitz. Let's take his childhood and let's take the one picture in his soccer team that he's not in, and let's take the fact that Bob's a workaholic and let's take the slow brain waves, and let's take that he might be bipolar and let's take that he might have had a heart attack at some point in time, and let's take the fact that he may or may not have had son that may or may not have had died from three or more different things.

> Let's just take all that in, Dr. Jacobvitz, and you tell us what part of any of that led him to pull that trigger the second, third, fourth, or fifth time? They couldn't bring it to you. And in fact, Dr. Jacobvitz I tried to ask her that and they remembered that today.
>
> Doesn't have anything to do with loading a 9 millimeter. Sure it does. Sure, it does. Because those are the actions. Those are the actions that need to be mitigated, if you can. And they can't. They can't.
>
> But I asked Dr. Jacobvitz, and she said, I can't render an opinion about his impulse control and his crime. Well then, I'm sorry. You can't help this jury then because that's what they need to know. If she could have, if she could have in her professional opinion or Dr. Susan Stone could have in their personal opinion said it was his impulse control that caused this, if it was his broken brain that caused this, they would have said it. They would have shouted it. They would have put it on chart after chart after chart, but they didn't because there is no evidence that any of that had anything to do with Richard Tabler's actions throughout his life. And they certainly had nothing to do with the murder of the four folks here in Bell County.

29.RR.54-57; *see also id.* at 57 ("You're looking for mitigating circumstances or circumstances that reduce his blame for an event, okay?").

539. The Eighth Amendment requires that a sentencing jury "not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *accord Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (sentencing process must allow consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind."). The Supreme Court has made clear that mitigating factors need not relate directly to the crime for which the defendant has just been convicted. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence – and thus the *Penry* question need not even be asked – unless the defendant also establishes a nexus to the crime.").

540. The mitigating evidence presented by the defense in this case is precisely the type of evidence that the Supreme Court repeatedly has found may support a life sentence. *See*, *e.g.*, *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (defendants subjected to a "disadvantaged background, or to emotional and mental problems, may be less culpable" than those who are not); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) ("mitigating evidence of mental retardation and childhood abuse has relevance to [a defendant's] moral culpability" and a jury must be able "to express its 'reasoned moral response' to that evidence in determining whether death [is] the appropriate punishment"); *Eddings*, 455 U.S. at 113 (overturning the decision of the Oklahoma Court of Criminal Appeals where it "found that the evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility.").

541. While the state "may argue, based on the circumstances of the case that [mitigating circumstances] are entitled to little or no weight," it may not tell the jury "to ignore or disregard mitigators." *United States v. Bolden*, 545 F.3d 609, 630 (8th Cir. 2008) (quoting *United States v. Johnson*, 495 F.3d 951, 978 (8th Cir. 2007). That is precisely what the prosecutor did throughout his closing argument. It is of no moment that the jury was not permitted to consider relevant mitigating evidence as a result of prosecutorial misconduct rather than court error. In either case, the result is the same; Petitioner's rights under the Eighth and Fourteenth Amendments were violated.

542. In its 2014 opinion rejecting Mr. Tabler's application for COA, the Court of Appeals rejected a challenge to the prosecutor's argument that there was no connection shown between Mr. Tabler's mental health problems and the crimes, in part because it had seen "nothing to establish" whether trial counsel could have had strategic grounds for not objecting.

Tabler, 588 F. App'x at 309. The court so ruled, however, without the benefit of substantial evidence, proffered in this petition, that an objection to this line of argument would have furthered trial counsel's clearly documented strategy of demonstrating that Mr. Tabler was a damaged person. The Court of Appeals also concluded that Tabler could not show a different outcome was "reasonably likely" but for this single error. *Id.* It did not consider the other improper prosecutorial arguments set forth here or, of necessity, their cumulative effect.

5. The Prosecutor Repeatedly Instructed Jurors That A Death Sentence Was Required In This Case.

543. After spending a substantial portion of his closing argument instructing the jury to ignore all of Petitioner's mitigating evidence because it did not relate directly to the crimes, Mr. McWilliams stated that the jury had "no choice" but to return a death sentence. 29.RR.57 ("So it's hard. You bet it's hard. It's hard to stand here and tell you that you have no choice."). Mr. McWilliams claimed that this was the case because the defense had not presented evidence of even a single mitigating circumstance:

> I had no way of knowing when I talked to you on voir dire that the evidence would end this way. But it has. It has. That's why they can't talk to you about the evidence. There just are no mitigating circumstances. You don't even have to get to the part of whether mitigating circumstances exist but are they sufficient to offset what he has done, or are they sufficient to reduce his moral blameworthiness?
>
> They're just not there and they can talk all day long but you didn't hear it from the witness stand. You didn't get it in any documents. It's just not there.

29.RR.57-58; *see also id.* ("It's not difficult folks. It is not. And you will be able to go home and say, I did what my oath required me. I listened. I looked, I combed every bit of evidence and it's just not there. It isn't there at all. And it's not. It's not your fault, it's not our fault.").

544. According to Mr. McWilliams, this purported lack of mitigating evidence required the jury to answer the special issues in favor of the death penalty:

> There is nothing in evidence that excuses, explains or more importantly mitigates what he did. He is responsible for it. You need to answer the questions 'yes,' he's a future danger. There's no doubt about that. And then you'll answer the question those circumstances don't exist. The answer to that is 'no.' Because there's nothing that reduces his blameworthiness and it will be hard.

29.RR.59.

545. By arguing that the jury had "no choice" other than to sentence Petitioner to death under the Texas death penalty procedure but that it was "not [their] fault," the prosecution entirely removed the jury's sense of responsibility for their decision. *See Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (Eighth Amendment violated where the prosecution seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death."). The jury was not able to make the "reasoned moral response" to the evidence before it that the Eighth Amendment requires. *Brown*, 479 U.S. at 545.

6. The Court's Instructions Did Not Cure The Prosecutor's Improper Argument.

546. Nothing in the Court's charge to the jury undid the damage of the prosecutor's lengthy argument. The Court first described mitigating evidence as follows:

> In deliberating on Issue No. 1 and Issue No. 2, the jury shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or circumstances of the offense that miligates [sic] for or mitigates against the imposition of the death penalty.

29.RR.11. The Court subsequently added that "[t]he jury shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." 29.RR.13.

547. Special issue number two was worded as follows:

> Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a

> sufficient mitigating circumstance or circumstances that a sentence of life improvement [sic] rather than a death sentence be imposed?

29.RR.13.

548. An unadorned instruction that the jury shall consider evidence relating to Petitioner's character and background does nothing to cure the error given that Mr. McWilliams repeatedly told the jury that Petitioner's character and background did not constitute mitigating circumstances unless they were tied to the crime. No instruction given by the Court in any way corrected this repeated misstatement of law. To the contrary, the Court's instruction was perfectly susceptible of being construed in the manner suggested by Mr. McWilliams.

7. Counsel Were Ineffective.

549. The Sixth Amendment requires that criminal defendants be provided the effective assistance of counsel. A defendant is denied the effective assistance of counsel whenever counsel's performance falls below "an objective standard of reasonableness" and the defendant suffers prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

550. Counsel's performance here fell below an objective standard of reasonableness. Counsel did not make a single objection throughout the prosecution's highly improper closing argument. As a result, Mr. McWilliams's inflammatory and legally erroneous comments were left unchecked.

551. The United States Supreme Court has repeatedly found defense counsel constitutionally ineffective for failing to uncover and present mitigating evidence at trial. *See, e.g.*, *Williams*, 529 U.S. 362; *Wiggins*, 539 U.S. 510; *Rompilla*, 545 U.S. 374; *Porter*, 558 U.S. 30; *Sears*, 561 U.S. 945. It necessarily follows that the minimum requirement for competent counsel is to ensure that the jury is actually able to *consider* that evidence. *See Penry v.*

Lynaugh, 492 U.S. 302 (1989) (absence of instruction allowing jurors to consider and give effect to mitigating evidence violated Eighth Amendment); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (death sentence unconstitutional because, although defense was allowed to introduce mitigating evidence, state courts would not consider it). Here, the prosecutor's closing argument effectively erased the entire defense case in mitigation in the eyes of the jury. Counsel was ineffective in failing to ensure that the jury actually considered the case in mitigation by objecting to the prosecutor's unconstitutional argument.

552. Counsel had no reasonable basis for failing to object to the prosecutor's comments. While Mr. McWilliams was cross-examining Dr. Jacobvitz during the penalty phase, he attempted to ask Dr. Jacobvitz whether anything in Petitioner's background "caused [Petitioner] to do what he did." 28.RR.146. Defense counsel objected as follows:

> Judge, I'm going to object at this point in time strenuously because that's not what question number three specifically says. You can consider the circumstances of the offense, you can consider the character, and you can consider the background. That doesn't specifically require that she give an opinion as to whether or not why he would load a 9 millimeter. That's improper questioning. That's not relevant.

Id. This objection resulted in the prosecutor withdrawing his question. *Id.* There was no possible reasonable basis for failing to object to the prosecutor's improper closing argument when counsel "strenuously" objected during trial.[75]

553. Moreover, the impropriety of Mr. McWilliams's argument was not subtle. The argument was plainly improper and highly damaging, especially insofar as it urged the jury to ignore the defense case in mitigation in its entirety. It is difficult to envision even a theoretical benefit that counsel may have received by failing to object, and certainly no benefit that would

[75] As noted above, counsel similarly successfully objected to the prosecutor's attempt to improperly question Dr. Jacobvitz about the Texas Defender Service during the penalty phase.

have outweighed the substantial damage wrought by the prosecutor's argument. No reasonable attorney would fail to object to such obviously harmful comments.

554. Petitioner specifically proffers, and will prove at a hearing, that defense counsel had no strategic reason for failing to object to any of the repeated improper comments made by the prosecutor during his lengthy closing argument. Counsel's performance was objectively deficient.

555. Petitioner was prejudiced by his counsel's failures. Mr. McWilliams's unchallenged argument permitted the prosecution to argue facts not in evidence, to ridicule defense witnesses, and to fault the defense for failing to call certain witnesses. Most critically, however, Mr. McWilliams was able to argue to the jury that they could not consider any of the defense evidence in mitigation because none of it tied directly into the crimes.

556. There is a reasonable probability that the jury, after hearing Mr. McWilliams's lengthy and strident argument and without any curative instruction from the Court, in fact rejected Petitioner's evidence in its entirety. The jury was therefore unable to consider and give effect to the evidence presented regarding Petitioner's traumatic upbringing and history of mental health problems. Indeed, the jury was out for only three hours when considering Petitioner's fate, a period that spanned lunch. 29.RR.60 (noting that the jury deliberated from 11:02 a.m. to 2:10 p.m.).

557. There is a reasonable probability that, had counsel objected, the jury would have considered Petitioner's mitigating evidence and would have voted to sentence him to life in prison. Petitioner was prejudiced by his counsel's failures, both independently and in combination with the other instances of deficient performance set forth in this pleading, and

this Court should rule that he is entitled to a new penalty phase proceeding. The Court should accordingly grant habeas relief on this ground.

I. Counsel Was Ineffective At Sentencing When He Presented A Closing Argument That Was Inflammatory, Harmful And In Conflict With The Defense Evidence At Sentencing.

1. Facts

558. The defense theory at sentencing was that Richard Tabler was not "normal" and that he had a lifelong history of behavior problems and mental illness along with a neglectful upbringing. 27 RR 69, 71. The defense presented testimony from Mr. Tabler's mother and sister that Richard had a difficult childhood, a history of self-mutilation, struggled in school and required mental health treatment at the age of thirteen. 27 RR, 73-118 (Lorraine Tabler); 122-169 (Kristina Martinez).

559. The defense also offered the testimony of three mental health experts. Dr. Meyer Proler, a neurophysiologist, testified that he interpreted an EEG that was performed on Richard Tabler in September of 2005. 28 RR 16. Dr. Proler found that the test reflected an abnormality in the left frontal temporal area "because of the presence of low frequency or slow activity that should not be there in a normal individual." *Id.* at 17.

560. Dr. Susan Stone, a psychiatrist and attorney, testified that Mr. Tabler suffered from Borderline Personality Disorder, Bi-Polar Disorder, ADHD, and abnormal brain functioning. 28 RR 29-48. On cross-examination of Dr. Stone, the State sought to establish that the more accurate diagnosis of Mr. Tabler was Anti-Social Personality Disorder (ASPD). *Id.* at 67-68, 76. Dr. Stone testified that she did not believe this was the appropriate diagnosis because Mr. Tabler's behaviors are better explained by his biologic disorders. *Id.* at 82.

561. Finally, the defense called Dr. Debra Jacobvitz, a psychologist and professor, who conducts research into the early parent-child relationship and its impact on child

development. She opined that Mr. Tabler's childhood was marked by abandonment and emotional neglect which impacted his development.

562. At the conclusion of the penalty presentation, defense counsel, Bucky Harris, was the first attorney for the defense to address the jury. 29 RR 15. Mr. Harris commenced his closing argument by expressing sympathy for the victims and their families; then he proceeded to refer to his client as "it," telling the jury that "it" was broken and could not be fixed:

> If you haven't figured it out by now, my client is flawed. You know *it's* like the Waterford crystal with a big crack across it. *It* is broken. For lack of a better term, *it* is damaged goods. And there is a strong possibility *it* is damaged fatally. What does fatally mean? As in to be dead. They say that the eyes are the windows to the soul, I am not sure that my client's soul was ever whole, was ever worthy, was ever functioning in the sense of the level of normalcy. *It* probably was broken before *it* was born. No one cared enough to want to repair *it* . . . My client has moved from a misstep to a stumble to a fall to destruction. It is like charting a bad stock. *It* continues to plummet. There is never recovery. And you're sitting there saying, Mr. Harris, I thought you were here to speak for Richard. I'm speaking about Richard.

29 RR 17.

563. Instead of pointing out to the jury the significance of the testimony of his mental health experts, who had provided evidence of Mr. Tabler's serious mental health impairments, he abandoned their testimony even though the State had not disproved them on cross-examination but, at best, raised questions for the jury to decide. He told the jury:

> So, Dr. Proler came before you and he said I read an EEG, and this man has something that appeared to be an abnormality in the left frontal lobe. *I don't know what that means*. But I know he's a 35 year professional. He's got MD after his name and he said I can read this. And that's the thinking area of the brain.

29.RR.18-19.

564. Counsel then told the jury to endorse the State's *cross-examination* of his expert Dr. Stone – that the appropriate diagnosis of Mr. Tabler was ASPD:

> And then Dr. Stone came before you and I said, this man is antisocial. And [the State] read this litany and they read 14 things and you might as well tattoo them on my client because they fit him like a glove. And in this case the glove fits. You cannot acquit."

29.RR.19.

565. Counsel's discussion of the third defense expert, Dr. Debra Jacobvitz, and her testimony regarding Mr. Tabler's dysfunctional family life, was both inflammatory and offensive. After telling the jury that he [Harris] had had a wonderful father he stated:

> Richard Tabler didn't have that luxury. He didn't have it. In fact, if you want to throw this out on the table top, the first conscious thought his father had of him was abort *it*. Throw the baby out with the bath water. Go see Dr. Quackenstein at the end of the dirt road, give him the $50, and flush the use - - now that's a little harsh. I'm sorry. If I have offended your sensitivity, they mean to kill my client.

29.RR.19.

566. Then, instead of explaining to the jury why the opinions of the defense experts were more valid than that of the State's rebuttal expert, he told the jury that the State's expert was one of the best, that all experts get paid a lot of money to give an opinion, and that one paid opinion is not any more or less right than any other paid opinion. He made these arguments in a manner highly offensive to the integrity of his own experts:

> And you know what's unique about a good doc, Richard Coons is one of the best or what's good about Susan Stone or Dr. Jacobvitz or Dr. Proler is I'm running around burning this county's money like hell with no tomorrow. I can't buy their opinion. I can get it. I can pay for it. But I can't tell them what it is. They don't come with an agenda. They just come with an opinion. And opinions are like noses. We all got them. Some of them just look different. Doesn't make them wrong. It just means they are what they are. And all we can do is dance them to that witness stand, let them talk to you, and you make a decision, not me.

29.RR.21.

567. Not once in his closing argument did counsel discuss Dr. Stone's diagnoses of Bi-polar Disorder, Borderline Personality Disorder and ADHD – all of which were considered

mitigating mental health disorders and all of which had ample support, not only in Dr. Stone's expert opinion, but in mental health records prepared over the course of Mr. Tabler's adolescence and youth. In other words, counsel abandoned his own theory of mitigation.

568. Counsel's harmful argument continued when he told the jury: "We know he has an abnormality of his frontal quadrant of his brain. It means in all likelihood that he's a *sociopath."* 29 RR 22. Then, in some bizarre attempt to put a positive spin on *sociopath*, counsel told the jury that "there was a time when if you were called a sociopath, that was a green light right on down to old spark, strap him in, turn it on, and *let's fry some marshmallows*." *Id.*

569. Co-counsel Donahue, too, adopted the opinion of the State's expert in his summation, telling the jurors that Mr. Tabler had "the classic symptoms" of antisocial personality disorder. 29.RR.30-31.

570. In his summation, the prosecutor capitalized on the defense abandonment of their mental health evidence and their concession that Mr. Tabler had ASPD. The prosecutor pointed out that not once did Mr. Harris or Mr. Donahue say anything about Mr. Tabler's bi-polar disorder, and that Dr. Coons had labeled Mr. Tabler a classic case of ASPD. "Those are the folks that make up death row" because they are "*sociopath*" and "do not care." 29 RR 39, 50.

2. Counsel Was Ineffective

571. Counsel's closing argument debased his client and was contrary to his own strategy of demonstrating at sentencing that Mr. Tabler had a long history of biologic mental illnesses and was not a person with ASPD. An attorney's deficient penalty phase closing can deprive a capital client of the effective assistance of counsel guaranteed by the Sixth Amendment. *See Rickman v Bell*, 131 F. 3d 1150 (6th Cir. 1997) (affirming 864 F. Supp. 686

(M.D. Tenn. 1994)) (counsel did not serve as advocate but, instead, showed contempt for his client such that he was a "second prosecutor" and defendant would have been better off without counsel). *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (counsel ineffective in that he conceded in closing argument that there was no reasonable doubt concerning only factual issues in dispute); *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. Dist. Ct. App. 2011) (counsel ineffective when he conceded defendant was guilty of robbery and burglary in closing argument when his stated strategy was only to concede theft which was consistent with his client's statement); *People v. Woods*, 502 N.E.2d 1103 (Ill. App. Ct. 1986) (counsel ineffective in burglary case for conceding in closing argument that defendants were guilty of theft which contradicted their theory of innocence which had been presented throughout the trial). Not only was counsel's closing in conflict with the defense evidence, it was contrary to the standards for capital defense work, which instruct counsel to humanize their client at sentencing. *See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.11(F), p. 1055-1056 (2003).

572. Numerous courts have recognized that, because ASPD suggests chronic criminality and an inability to be rehabilitated, the diagnosis is aggravating, not mitigating. *See, e.g., Walbey v. Quarterman*, 309 Fed.Appx. 795 (5th Cir. 2009) (anti-social personality disorder is an aggravating diagnosis and supported the state's evidence of future dangerousness); *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217 (11th Cir. 2010) (defendant not prejudiced at sentencing when his attorney elected not to introduce mental-health testimony because diagnosis included antisocial personality disorder, which is more harmful than mitigating); *Cummings v. Sec'y for Dep't of Corr.*, 588 F. 3d 1331, 1368 (11th Cir. 2009) ("[I]n the mental health area, Cummings is left mainly with a diagnosis of antisocial

personality disorder, which is not mitigating but damaging."); *Weeks v. Jones*, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994) (stating antisocial personality disorder is "not .... mitigating as a matter of law"); *Guinan v. Armontrout*, 909 F.2d 1224, 1230 (8th Cir. 1990) (evidence of ASPD, which portrays the defendant "as an individual prone to violent outbursts due to an aggressive personality disorder which is extremely resistant to treatment," more likely to support the state's position than to be viewed as mitigating); *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988) ("For the ordinary citizen it would, to say the least, be paradoxical that a person who was likely not to accept social norms with respect to lawful behavior should be treated more kindly than the person who was law abiding."); *Eddings v. Oklahoma*, 455 U.S. 104, 126 n.8 (1982) (Burger, C.J., dissenting) (evidence of ASPD "may connote little more than that [the defendant] is egocentric, concerned only with his own desires and unremorseful, has a propensity for criminal conduct, and is unlikely to respond well to conventional psychiatric treatment - hardly significant 'mitigating' factors."). In summary, "no competent capital defense attorney would ever pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment." Kathleen Wayland & Sean O'Brien, Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels, 42 Hofstra L. Rev. 519, 530 (2013).

573. Effective counsel would have endorsed the testimony of his experts, and would have explained that Mr. Tabler suffered from the time he was a child from *biologic* mental health disorders, that these disorders affected his ability to control his behavior, and that these mental health issues mitigated against imposition of the death penalty. At the very least, effective counsel would have refrained from calling his client "it" and making jocular remarks about roasting marshmallows.

574. Counsel's decision to abandon the evidence of his experts and endorse the troubling, non-mitigating, and inappropriate diagnosis of ASPD was unreasonable and could not have been guided by any strategy.

575. Petitioner was prejudiced. The prosecutor made vigorous use of defense counsel's abandonment of the testimony of his mental health experts and concession that Mr. Tabler was a sociopath. The prosecutor stressed to the jury that a person with ASPD is a calculating, sociopath with no remorse. 29 RR 54. Individually and cumulatively with the other claims in this petition, counsel's deficiencies prejudiced the penalty phase defense. This Court should therefore grant habeas relief in the form of a new sentencing.

J. Trial Counsel's Deficiencies Cumulatively Prejudiced The Defense At The Penalty Phase.

576. As described above, Richard Tabler's trial attorneys took a pervasively passive approach to their investigation, preparation, and litigation of this case. They not only failed to learn that Mr. Tabler suffers from Klinefelter's Syndrome and Fetal Alcohol Spectrum Disorder, but failed to conduct an independent social history investigation, limiting themselves to brief interviews with his mother and sister and a phone call with his father. Of necessity, then, they could not make the social history available to their experts. They did not even rehabilitate the experts with information in their possession, to rebut damaging cross-examination. Their approach to the State's future danger case was equally anemic. They made no effort to object to inadmissible evidence, or to rebut or mitigate the case for death with evidence available to them. They sat silent during the prosecutor's blatantly improper summation. And, in their own summation, both counsel turned tail, abandoning their own experts' opinions and stampeding to adopt the prosecution's theory that Mr. Tabler is a sociopath.

577. Even individually, these deficiencies require relief. Cumulatively, they demand it. There is a easily a reasonable probability that, if the jurors had learned that Mr. Tabler suffers from congenital medical disorders that underlie his lifetime of dysregulated conduct; if they had heard a case in mitigation informed by a constitutionally adequate social history investigation; if the defense had subjected the prosecution case to adversarial testing; and if Mr Tabler's attorneys had not abandoned his defense in summation, at least one of the jurors would have voted for a life sentence.

578. Because counsel's deficiencies prejudiced the penalty phase defense cumulatively as well as individually, this Court should grant habeas relief.

III. BECAUSE RICHARD TABLER'S KLINEFELTER'S SYNDROME AND FETAL ALCOHOL SPECTRUM DISORDER – CONGENITAL DEFECTS BEYOND HIS CONTROL – CAUSE EXECUTIVE AND ADAPTIVE FUNCTIONING DEFICITS COMPARABLE TO THOSE EXHIBITED BY THE INTELLECTUALLY DISABLED, HE IS CATEGORICALLY INELIGIBLE FOR THE DEATH PENALTY, AND HIS COUNSEL WERE INEFFECTIVE FOR FAILING TO MAKE THAT CLAIM.

579. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court considered whether the punishment of death for intellectually disabled[76] offenders was "excessive," or disproportionate to their crimes. *Id.* at 311. To make this judgment, it applied, not the standards that prevailed in seventeenth-century England or upon the adoption of the Bill of Rights in the eighteenth-century United States, but "'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 311-12 (quoting *Trop v. Dulles*, 356 *U.S.* 86, 100-101 (1958)). It first reviewed the "objective" evidence of an evolving societal consensus, observing that numerous state legislatures had prohibited capital punishment for the intellectually disabled and that death sentences for such offenders were increasingly infrequent even in states that permitted it, that "organizations with germane expertise" had spoken out against it, and that polling data reflected "widespread consensus . . . that executing the mentally retarded is wrong." 536 U.S. at 312-17 & n.21.

580. This objective evidence, while important, was not dispositive. The Constitution, the Court held, required it to exercise its "own judgment" about whether there was "reason to disagree with" the societal consensus. *Id.* at 312-13. It found:

> Mentally retarded persons frequently know the difference between right and wrong, and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand

[76] *Atkins* and some of the other cases cited in this claim use the then-current term "mentally retarded." Practitioners in the field now generally use the term "intellectually disabled."

> the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318.

581. These deficiencies prevented either of the traditionally recognized justifications for capital punishment from applying to intellectually disabled offenders. First, the Court's "narrowing" jurisprudence, which restricts the society's most extreme retributive sanction of death to the most serious offenders, necessarily excluded them. "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319.

582. Similarly, the Court found that, because deterrence applies only to premeditated and deliberate murders, imposing the death penalty on the intellectually disabled could not promote that goal:

> [I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Id. at 320.

583. Thus, the Court's "independent evaluation" of the issue yielded no reason to disagree with the objective indicia of societal consensus it had reviewed. It concluded that Atkins's death sentence constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Id.* at 321.

584. As a class, individuals with Klinefelter's Syndrome, including Richard Tabler, exhibit characteristics identical in essential respects to those that diminish the culpability of intellectually disabled offenders.

> Multiple behavioral manifestations and central nervous system dysfunctions are commonly associated with this syndrome, if untreated, including decreased impulse control, heightened anxiety, mood lability, low frustration tolerance, depression, and executive function impairment. . . . The neuropsychological profile for 47,SSY [Klinefelter's] . . . has been associated with hyoptonia (low muscle tone), language-based learning disabilities, speech delays, and cognitive deficits coupled with atypical brain development.

A601.[77]

585. Individuals with FASD, including Richard Tabler, exhibit many of the same characteristics. A key criterion for a diagnosis of FASD is the presence of one or more central nervous system abnormalities, including deficits in executive functioning. Such deficits include: poor organization, planning, or strategy use; concrete thinking; lack of inhibition, difficulty grasping cause and effect; inability to delay gratification; difficulty following

[77] *See* Wade, B. C., Joshi, S. H., Reuter, M., Blumenthal, J. D., Toga, A. W., Thompson, P. M., & Giedd, J. N. (2014), Effects of sex chromosome dosage on corpus callosum morphology in supernumerary sex chromosome aneuploidies, *Biology Of Sex Differences*, *5*(1), 1-34. doi:10.1186/s13293-014-0016-4; Gropman, A., & Samango-Sprouse, C. A. (2013, February), Neurocognitive variance and neurological underpinnings of the X and Y chromosomal variations, *American Journal of Medical Genetics Part C Seminars in Medical Genetics* (Vol. 163, No. 1, pp. 35-43) (Wiley Subscription Services, A. Wiley Company); Savic, I. (2012), Advances in research on the neurological and neuropsychiatric phenotype of Klinefelter syndrome, *Current opinion in neurology*, *25*(2), 138-143; Bishop, D. M., Jacobs, P. A., Lachlan, K., Wellesley, D., Barnicoat, A., Boyd, P. A., & ... Scerif, G, (2011), Autism, language and communication in children with sex chromosome trisomies, *Archives Of Disease In Childhood*, *96*(10), 954-959. doi:10.1136/adc.2009.179747; Visootsak, J., & Graham, J. M. (2009), Social function in multiple X and Y chromosome disorders: XXY, XYY, XXYY, XXXY, *Developmental Disabilities Research Reviews*, *15*(4), 328-332. doi:10.1002/ddrr.76; Giedd, J. N., Clasen, L. S., Lenroot, R., Greenstein, D., Wallace, G. L., Ordaz, S., ... & Chrousos, G. P. (2006), Puberty-related influences on brain development. *Molecular and cellular endocrinology*, *254*, 154-162.

multistep directions; difficulty changing strategies or thinking of things in a different way (i.e., perseveration); poor judgment; and inability to apply knowledge to new situations.[78]

586. In addition, many persons who have FASD, including Richard Tabler, manifest "clinically significant difficulty" with social skills, including: lack of stranger fear, frequent scape-goating, naivete and gullibility; inappropriate choice of friends; preferring younger friends; immaturity; superficial interactions; adaptive skills significantly below cognitive potential; difficulty understanding the perspective of others; poor social cognition; and clinically significant inappropriate initiations or interactions.[79]

587. Since *Atkins,* informed observers increasingly have recognized that other severe mental disorders are morally indistinguishable from mental retardation. In 2006, the American Bar Association adopted a resolution providing in relevant part that:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their

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[78] Centers for Disease Control and Prevention, Department of Healtha nd Human Services, *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* 15 (2004); *see also* P.W. Kodituwakku, N.S. Handmaker, S.K. Cutler, E.K. Weathersby, S.D. Handmaker, *Specific Impairments in Self-Regulation in Children Exposed to Alcohol Prenatally*, 19 Alcohol Clin. Exp. Res. 1558-64 (1995); P.D. Connor, P.D. Sampson, F.L. Bookstein, H.M. Barr, A.P. Streissguth, *Direct and Indirect Effects of Pre-Natal Alcohol Damage on Executive Function*, 18 Dev. Neuropsych. 331-354 (2000); H. Carmichael-Olson, J.J. Feldman, A.P. Streissguth, P.D. Sampson, F.L. Bookstein, *Neuropsychological Deficits in Adolescents With Fetal Alcohol Syndrome: Clinical Findings*, 22 Alcohol Clin. Exp. Res. 1998-2012 (1998); P.D. Connor, A.P. Streissguth, P.D. Sampson, et al, *Executive Functioning Deficits in Adults Prenatally Exposed to Alcohol*, 23 Alcohol Clin. Exp. Res. 1395-1402 (1999).

[79] Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis, at 16 (emphasis added); *cf.* C.D. Coles, K.A. Platzman, *Behavioral Development in Children Prenatally Exposed to Drugs and Alcohol*, 28 Intern. J. Addict. 1393-1433 (1993); S.J. Kelly, N. Day, A.P. Streissguth, *Effect of Prenatal Alcohol Exposure on Social Behavior in Humans and Other Species*, 22 Neurotox. Terat. 143-49 (2000); T.M. Roebuck, S.N. Matson, E.P. Riley, *Behavioral and Psychosocial Profiles of Alcohol-Exposed Children*, 23 Alcohol Clin. Exp. Res. 1070-76 (1999).

> conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.

American Bar Association, Resolution 122A (August 7-8, 2006), *reprinted in* 30 Mental and Physical Disabilities Law Review 668 (September-October 2006). The American Psychiatric Association, the American Psychological Association, and the National Alliance of the Mentally Ill had previously adopted this resolution in identical form. *Id.* at 668.25.[80]

588. Several experienced jurists, faced with the excruciatingly difficult duty of reviewing death sentences imposed on severely mentally ill defendants, have concluded that the categorical exclusion of *Atkins* should not be limited to the intellectually disabled. In *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002), Justice Rucker, citing *Atkins* and dissenting, wrote:

> There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency. . . . I would hold that a seriously mentally ill person is not among those most deserving to be put to death. To do so in my view violated the Cruel and Unusual Punishment provision of the Indiana Constitution.

Id. at 502-03; *accord State v. Scott*, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting) ("evolving standards of decency" should preclude execution of defendant who has chronic

[80] All three of these organizations, and the National Mental Health Association, had previously taken official stances against capital punishment for persons with severe mental illness. *See* National Mental Health Association, News Release, NMHA Announces Position on Death Penalty (Apr. 3, 2001), available at http://www1.nmha.org/newsroom/system/news.vw.cfm?do=vw&rid=276 (last visited August 6, 2007); National Alliance for the Mentally Ill, Press Release, No Death Penalty for Persons with Severe Mental Illnesses (Jan. 12, 1998), available at http://www.nami.org/Template.cfm?Section=Press_Release_Archive (last visited August 6, 2007); *see also* American Psychiatric Association, Moratorium on Capital Punishment in the United States (2000) (basing support for moratorium in part in effect of capital punishment on the mentally ill), available at http://www.psych.org/edu/other_res/lib_archives/archive/2006.pdf.

schizophrenia, a medical disease); *see also State v. Ketterer*, 855 N.E.2d 48, 81-87 (Ohio 2006) (Stratton, J., concurring) (citing ABA resolution, and concluding that "[t]he time has come for our society to reexamine the execution of persons with severe mental illness"). Other jurists have voiced similar reservations in other contexts, as have representatives of religious communities, the European Union, and the United Nations Commission for Human Rights. *See* Laurie T. Izutsu, Note, *Applying* Atkins v. Virginia *to Capital Defendants With Severe Mental Illness*, 70 Brook. L. Rev. 995, 1007-10 & nn. 86-103 (2005) (collecting references). National polling data, too, reflect increasing public opposition to the execution of those with severe mental impairments. *Id.* at 1010-11 & nn. 105-116.

589. In summary, both Klinefelter's Sydrome and FASD are congenital birth defects that originate *in utero* for reasons beyond the sufferers' control. Both impair judgment, reasoning, impulse control, and the ability to appreciate consequences. Thus, Justice Stevens's reasons for declaring the execution of the intellectually disabled unconstitutional apply equally to those who, like Richard Tabler, suffer from these disorders: "Because of their disabilities in areas of reasoning, judgment, and control of their impulses . .. they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 436 U.S. at 306.

590. This Court should declare Richard Tabler ineligible for the death penalty because his conditions undermined his moral culpability, and because his conditions originated in his biology, not his choice. Furthermore, as described above, his trial counsel were deficient for failing to conduct the constitutionally required background investigation that would have uncovered the congenital defects that made him ineligible. Their deficiency, by exposing their

client to the death penalty, was obviously prejudicial. The Court should therefore grant the writ on this ground.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, Petitioner respectfully requests that the Court grant him the following relief:

(1) Such discovery, including depositions and interrogatories, as is necessary for full and fair resolution of the claims set forth in this Petition;

(2) An evidentiary hearing on all claims involving disputed issues of fact;

(3) Leave to amend the Petition in light of any evidentiary hearing and fact development procedures;

(4) Leave to file a Memorandum of Law in support of the Petition;

(5) A stay and abeyance, to allow Petitioner to exhaust state remedies, as Petitioner will request by separate motion;

(6) Should it assist the Court, a status conference to discuss timing of the above; and

(7) The issuance of a Writ of Habeas Corpus to provide Petitioner with relief from his unlawful conviction and sentence.

Respectfully submitted,

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September 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this date, I served the foregoing Amended Petition For Writ Of Habeas Corpus, On Remand, on the following by operation of the electronic case filing system:

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Dated: September 9, 2015

Case No. 22-70001

CAPITAL CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD LEE TABLER,

Petitioner - Appellant,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent – Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION
CIVIL ACTION NO. W-10-CA-034-RP

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Dated: August 1, 2022

RICHARD TABLER,	:	**No. 22-70001**
	:	
Petitioner-Appellant,	:	**CAPITAL HABEAS CORUPS**
	:	
v.	:	**On Appeal from the United States Court for the Western District of Texas, Waco Division**
BOBBY LUMPKIN,	:	
	:	
Respondent-Appellee.	:	**Civil Action No. W-10-CA-034-RP**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of the Court may evaluate possible disqualifications or recusal.

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Dated: August 1, 2022

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REQUEST FOR ORAL ARGUMENT

Petitioner-Appellant Richard Tabler requests oral argument. This case presents this Court with an early opportunity to address the scope and limitations of the Supreme Court's recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), and oral argument would assist the Court in making those determinations. In addition, argument would help the Court both (1) to decide whether to expand the certificate of appealability ("COA") for the reasons in the concurrently filed application, and (2) to assess the multiple grounds for excusing any default of Mr. Tabler's claims—including counsel's abandonment and incorrect advice about the law—and the substantial claims of ineffective assistance of trial counsel that state habeas counsel could have presented. These grounds appear both in this pleading and in the concurrently filed application to expand COA.

PRELIMINARY STATEMENT RESPECTING CITATION AND FORM

Petitioner cites the Record on Appeal as required by Fifth Circuit Court of Appeals Form 1: ROA.___. He cites excerpts from the record as RE___. The record of the first appeal in this Court is cited as R.___, and excerpts from the record for that appeal as RE1.___.

State court proceedings in the Bell County Reporter's Record prepared for direct appeal are cited as [volume number] RR [page number]. Pleadings and orders in the Bell County Clerk's Record are cited the same way: [volume number].CR.[page number].

The opinions of the Texas Court of Criminal Appeals, the district court, and this Court appear in the record excerpts. They are cited by reference to the Record on Appeal and, where available, the official or unofficial Westlaw citations.

All emphasis is added unless otherwise indicated; parallel citations are omitted.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 2254 because appellant is a state prisoner challenging the constitutionality of his detention. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because he appeals from a final judgment denying habeas relief.

The district court issued its order denying appellant's timely motion pursuant to Rule 59 of the Federal Rules of Civil Procedure on January 25, 2022. He filed a timely Notice of Appeal on February 23, 2022.

This is an appeal from a final order and judgment disposing of all parties' claims.

APPELLANT'S BRIEF ON THE MERITS

STATEMENT OF ISSUES

1. Whether state habeas counsel's abandonment and deficient performance respecting waiver excused the default of Mr. Tabler's state habeas rights.

   a. Whether a habeas petitioner whose state postconviction counsel is guilty of abandonment or extraordinarily deficient performance has not "failed to develop" the claim and may receive federal fact development. *See* 28 U.S.C. § 2254(e)(2).

   b. Whether *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), if read as foreclosing federal habeas review of a constitutional claim for petitioners abandoned by their state habeas counsel, would unconstitutionally suspend the writ and deprive those petitioners of due process of law.

   c. Whether state habeas counsel's abandonment and deficient performance resulted in Mr. Tabler's involuntary and incompetent waiver, excusing default.

2. Whether trial counsel's failure to challenge inadmissible victim-impact evidence relating to individuals not named in the indictment deprived petitioner of the effective assistance of counsel.

STATEMENT OF THE CASE

A. Introduction

Through no fault of his own, Richard Tabler began and has lived his life with a severely damaged brain. He was born with two independent congenital birth defects: Klinefelter's Syndrome ("KS" or "extra X chromosome" syndrome) and Fetal Alcohol Spectrum Disorder ("FASD") (resulting from maternal alcohol use during pregnancy). Along with bipolar disorder and other impairments, his brain damage has played a pivotal role in the issues before this Court because it has crippled his ability to engage in consequential thinking. In the words of an expert who testified before the district court, his brain defects cause extreme "temporal discounting," "assigning more weight to rewards and punishment in the present. . . . [I]t looks like there's no future cost that he won't trade off for some current gain" or "current escape." ROA.7863. This hallmark symptom forms the biological substrate of the waiver issues discussed below.

The waiver issues, moreover, present this Court with an early opportunity to assess the reach and limitations of the recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). Under agency principles, *Ramirez* held, a prisoner is "at fault" under 28 U.S.C. § 2254(e)(2) "for counsel's negligent failure to develop the state postconviction record." *Id.* at 1735. Accordingly, except when narrow exceptions apply, a federal court may not expand the state-court record to determine whether

postconviction counsel's negligence excuses the default of federal claims of ineffectiveness of trial counsel ("IATC"). *Id.* at 1734, 1736 (citing *Martinez v. Ryan*, 566 U.S. 1 (2012)).

Ramirez addressed the relationship between § 2254(e)(2) and *Martinez*. This case, however, also involves the relationship between the statute and *Maples v. Thomas*, 565 U.S. 266 (2012). Mr. Tabler's attorneys not only provided extraordinarily deficient assistance but explicitly abandoned him during the hearing at which the state court found him competent to waive his state habeas rights and accepted his waiver. Counsel's abandonment appears on the state court record in the hearing transcript. Furthermore, because counsel severed the agency relationship between attorney and client, Mr. Tabler bore no fault for the default under *Maples* and did not "fail to develop" the state court record. Section 2254(e)(2) therefore poses no obstacle to federal-court development of either cause and prejudice to excuse the default or of the facts supporting his federal claims.

If counsel had not abandoned their client, they could have presented the state habeas court with persuasive reasons to reject the waiver. In particular, counsel never informed the court that their client had repeatedly changed his mind about whether to waive and never disclosed an eighteen-page report by a neuropsychologist who detailed Mr. Tabler's "deep and severe constellation of mental illnesses" that "ha[d] been disabling and debilitating for him since at least early adolescence." ROA.1503.

Because the district court granted COA on the question whether state habeas counsel "rendered ineffective assistance for failing to challenge his competency" (ROA.7506), Mr. Tabler presents it below in Point I. He has concurrently filed an *Application to Expand COA* presenting additional grounds undermining the waiver, including counsel's provision of incorrect advice about governing law.

One of claims counsel abandoned, along with their client, was that trial counsel ineffectively failed to object to the penalty phase presentation of detailed, emotional testimony—inadmissible under Texas law—by the relatives of two victims of unadjudicated homicides. The principal facts supporting this claim appear on the face of the state court record. The district court granted COA on the claim, which Mr. Tabler presents below in Point II. His concurrently filed *Application to Expand COA* advances additional instances of substantial IATC claims.

B. Procedural History

Mr. Tabler stood trial in 2007 before a Bell County, Texas, jury on two counts of capital murder for intentionally or knowingly causing the deaths of Haitham Zayed and Mohamed Amine Rahmouni on November 26, 2004. RE 4. He was separately indicted in Bell County for the shooting deaths of Tiffany Dotson and Amanda Benefield on November 28, 2004, but the state never tried him on those charges and the court dismissed them after the capital conviction and death sentence. *See State v. Tabler*, No. 57,384, Order of Dismissal (264th Dist. Ct., Bell Co., Aug.

11, 2009); ROA.1087-88. The jury found Mr. Tabler guilty on March 21, 2007. 24.RR.51, ROA.6377, RE 5. It rendered verdicts on the special issues that compelled imposition of the death penalty on April 2, 2007. RE 5; 29.RR. 61, ROA.7092. The trial court formally imposed the death sentence the same day. 29.RR. 63-64, ROA.7094-95.

Mr. Tabler's direct appeal and state habeas corpus cases proceeded simultaneously, as required by Texas law. Tex. C.C.P. Art. 11.071(4)(A). During a brief hearing conducted on September 30, 2008, the trial court ruled that Mr. Tabler was competent to waive his state habeas rights and accepted his waiver. ROA.3096-108, RE 6. At the hearing, counsel announced that they took no position about what should happen and did nothing to advocate for Mr. Tabler's interests. ROA.3096. Within months, counsel moved at Mr. Tabler's direction to withdraw the waiver, but the Court of Criminal Appeals ("CCA") denied the motion. ROA.3287-93.

On December 16, 2009, the CCA affirmed the convictions and death sentence on direct appeal. *Tabler v. State*, No. AP-75,677, 2009 WL 4931882 (Tex. Crim. App. 2009) (RE 7). The Supreme Court denied certiorari on October 4, 2010. *Tabler v. Thaler*, 562 U.S. 842 (2010).

Meanwhile, on February 12, 2010, the attorneys who had represented Mr. Tabler in state habeas proceedings moved in the federal district court for

appointment and a stay of execution, and the district court granted the motions. ROA.29-60.

At counsel's request, the district court appointed a psychologist to address Mr. Tabler's competency to waive his federal habeas rights and held a hearing on August 17, 2011. ROA.7637-58. The court found that Mr. Tabler's efforts to waive were involuntary and ruled that habeas proceedings should go forward. ROA.126-30, ROA.7655-56. Counsel then filed Mr. Tabler's habeas corpus petition, which the district court denied on February 9, 2012. ROA.182-258, ROA.446-74 (RE1.8). The court also denied a COA on all issues. ROA.473 (RE1.2).

Represented by new counsel, Mr. Tabler appealed and sought COA, which this Court denied on October 3, 2014. *Tabler v. Stephens*, 588 F. App'x 297 (5th Cir. Oct. 3, 2014), ROA.1003. The Court determined, among other rulings, that the then-recent opinion in *Martinez* did not require it to excuse the procedural default of Mr. Tabler's state habeas claims. *Martinez* was inapplicable because Mr. Tabler had waived his state habeas rights and the only state postconviction proceeding that had occurred was a competency hearing. In the Court's view, *Martinez* did not "extend" to such a proceeding. *Tabler v. Stephens*, 588 F. App'x at 302-07, ROA.1007-10. Moreover, it ruled, Mr. Tabler's "bullet-pointed" list of potential errors had "not made a 'substantial showing' of his underlying claim of ineffective assistance of trial counsel" under *Martinez*. *Id.* at 306, ROA.1009.

The Court vacated its order on January 27, 2015, in light of the Supreme Court decision the previous week in *Christeson v. Roper*, 574 U.S. 373 (Jan. 20, 2015). It ruled that the *Martinez* rule "logically extends" to "ineffective assistance of habeas counsel that prevents an initial-review collateral proceeding from ever taking place." The Court remanded to allow the district court to determine whether state habeas counsel's ineffectiveness could excuse the default. *Tabler v. Stephens*, 591 F. App'x 281 (5th Cir. 2015), ROA.1019.

On remand, after counsel had filed an amended petition on September 9, 2015 (ROA.710), the district court held a hearing on several of Mr. Tabler's pro se requests to waive his habeas rights. The court heard a full day of testimony about the competency and voluntariness of his prospective waiver on July 9, 2018, but Mr. Tabler then withdrew his request and agreed to go forward. ROA.7679, ROA.3000-03.

The district court denied habeas relief, without holding a hearing, on June 10, 2021, but granted a COA on the two issues addressed in this brief. ROA.7422.

On February 23, 2022, Mr. Tabler filed a notice of appeal from the district court's June 10, 2021, order denying habeas relief and its January 25, 2022, order denying Rule 59 relief from judgment and expansion of COA. ROA.7634. In compliance with the Court's subsequent orders extending his time to file and

expanding the word-volume limitation to 22,500 words, he files this *Brief on the Merits* concurrently with an *Application to Expand COA*.

C. Trial and Direct Appeal

The Bell County District Court appointed Robert Harris to represent Mr. Tabler on November 30, 2004, the day after Mr. Tabler's arrest for the murders of Mr. Zayed and Mr. Rahmouni. ROA.1049.[1] Mr. Harris's initial co-counsel and mitigation investigator, Russell Hunt and Pamela Stites, withdrew because of a conflict of interest, and the court replaced them with attorney John Donohue and mitigation investigator Gerald Byington. ROA.1047, ROA.1052-53, ROA.1090, ROA.1080-81. Except for interviews of Mr. Tabler's mother, father, and sister, no team member or expert ever spoke to anyone who had known Richard Tabler before the time of the crime. ROA.1059, ROA.1082 (Hunt billing); 28.RR.109 (Dr. Jacobvitz), ROA.1418 (Byington), ROA.1095 (Stites).

The defense investigated whether Mr. Tabler suffered from brain damage. Counsel obtained funding for Dr. Meyer Proler, a neurophysiologist, to conduct an EEG test, which yielded abnormal results. 28.RR.9, ROA.6852, 28.RR.16, ROA.6859; ROA.1417. The court then allowed counsel to retain Dr. Dineen Milam,

[1] As previously observed, Mr. Tabler was also indicted in Bell County for the shooting deaths of Tiffany Dotson and Amanda Benefield on November 28, 2004, but those charges were dismissed after the capital conviction and death sentence. ROA.1085-89.

a neuropsychologist, who conducted a number of tests of Mr. Tabler's functioning. Mr. Tabler demonstrated diagnostically significant disparities between his scores, and he achieved impaired scores on a series of tests designed to assess brain functioning. ROA.1785, ROA.2539. Nevertheless, Dr. Milam did not write a report or testify at Mr. Tabler's trial.

About six weeks before the penalty phase began, in February 2007, psychiatrist Susan Stone[2] interviewed Mr. Tabler and found that he suffered from severe mental health impairments: attention deficit hyperactivity disorder, bipolar disorder, and a borderline personality disorder. 28.RR.30, ROA.6873, 28.RR.50-53, ROA.6893-96. About two weeks before trial, Dr. Deborah Jacobvitz, a child psychologist and professor at the University of Texas at Austin, interviewed Mr. Tabler as part of an evaluation of his developmental history. 28.RR.88-89, ROA.6931-32, 28.RR.106, ROA.6949.

Mr. Tabler's trial for the shooting deaths of Amine Rahmouni, the manager of a strip club called Teazers near Fort Hood, Texas, and his friend Hatham Zayed began on March 19, 2007. ROA.5967. Mr. Tabler knew Mr. Rahmouni because he had frequented the club. The State presented the witness who discovered the bodies

[2] Dr. Stone is deceased. *See Obituary*, Susan Stone, Austin American-Statesman, Sept. 11, 2013, http://www.legacy.com/obituaries/statesman/obituary.aspx?pid=166905319 (visited Aug. 2, 2015).

and the medical examiner who determined that the victims had died of gunshot wounds. 22.RR.25, ROA.5995, 23.RR.7, ROA.6086, 23.RR.12-13, ROA.6091-92. Kimberly Geary testified that Mr. Tabler had told her that he had "just shot two guys," and a ballistics expert linked a weapon recovered from Ms. Geary's home with projectiles and shell casings recovered from the location where the bodies were found. 23.RR.123, ROA.6202, 23.RR.134, ROA.3213.

The officers who arrested and interrogated Mr. Tabler two days after the shooting testified that he made a series of increasingly inculpatory statements. According to Detectives Clemons and Steiglich, in his first two statements Mr. Tabler told them that he only knew about the murders because someone he knew only as "Tim" had bragged about committing them. In his third statement, Mr. Tabler said that he was present during the killings, but that Tim had shot both men. Finally, Mr. Tabler told police that he shot Amine and Frank because Amine had threatened to wipe out his whole family for ten dollars. 23.RR.187-90, ROA.6266-69, 23.RR.209-18, ROA.6288-97.

Defense counsel made no opening statement, called no witnesses, introduced no exhibits, and rested. 24.RR.5, ROA.6331. The jurors began their deliberations at 11:00 a.m. and returned with a verdict of capital murder at 1:30 p.m. 24.RR.51-52, ROA.6377-78.

At the penalty phase, in addition to presenting evidence of other bad acts, the State presented detailed evidence about the unadjudicated homicides of two Teazer's dancers, Amanda Benefield and Tiffany Dotson, who were shot to death two days after Mr. Zayed and Mr. Rahmouni were killed. Kim Geary testified that Mr. Tabler had told her that he had shot the young women because they had been telling people that he had shot Mr. Zayed and Mr. Rahmouni. 26.RR.141, ROA.6631. The State also presented emotional testimony from relatives of Ms. Benefield and Ms. Dotson about their personal bonds, life histories, and struggles. 26.RR.64-71, ROA.6554-61, 26.RR.76-78, ROA.6566-68.

Trial counsel Harris promised the jury in his opening, consistently with the strategy evident in the records created before trial, that the defense would demonstrate that Mr. Tabler was not "normal." 27.RR.69, ROA.6741. The defense testimony comprised vague summaries provided by Mr. Tabler's mother and sister and expert testimony based primarily on records review. Lorraine Tabler described her troubled marriage and the many changes in her own living circumstances during her son Richard's[3] childhood and youth, including her abandonment of the family when he was nine. She did not describe Richard's development or behavior as a small child. Her only description of his school years implied willful misbehavior: he

[3] Here and wherever necessary for clarity throughout, this pleading will refer to Mr. Tabler and his immediate family by first name.

"had problems in school" because he "did not want to pay attention." 27.RR.83-84, ROA.6755-56. Her general descriptions of Richard's behavior as an adolescent focused on his non-compliance with her own parental guidance. 27.RR.94-98, ROA.6766-70.

Kristina[4] Martinez, Richard's sister, was only seven years old when he was born, but was expected to take substantial care of him from an early age. 27.RR.122, ROA.6794. Although she thought that Richard was "not normal" (27.RR.124, ROA.6796), she described him as a "pest" in a manner typical of older siblings describing their younger siblings. 27.RR.124-28, ROA.6796-800, 27.RR.141, ROA.6813. She testified that he received a diagnosis of ADHD in school and once received treatment for a head injury he received falling from a tree. 27.RR.137, ROA.6809, 27.RR.142, ROA.6814, 27.RR.144, ROA.6816.

Aside from the two family witnesses, the defense relied on some of the mental health experts who had evaluated Mr. Tabler before trial. Dr. Meyer Proler, the clinical neurophysiologist, interpreted the EEG and found abnormal activity in the left frontal area. 28 RR.16-17, ROA.6859-60, 28.RR.21-25, ROA.6864-68, 28.RR.27, ROA.6870. Dr. Susan Stone, the psychiatrist, recounted the diagnoses

[4] Although the transcript spells the name of Mr. Tabler's sister "Christina," the correct spelling is "Kristina," and this pleading uses that spelling.

reflected in the records she had reviewed and acknowledged that she had received only skimpy background information. 28.RR.32-34, ROA.6875-77, 28.RR.53, ROA.6896. Dr. Jacobvitz, the child psychologist, identified factors in Mr. Tabler's family dynamics that had prevented him from developing normally. She acknowledged on cross-examination that she had not verified various statements Mr. Tabler had made to her. 28.RR.100-42, ROA.6943-85.

The defense rested after Dr. Jacobvitz's testimony. 28.RR.149, ROA.6992. In rebuttal, the state called Richard E. Coons, M.D., a psychiatrist, who diagnosed Mr. Tabler as having antisocial personality disorder and attention deficit hyperactivity disorder ("ASPD" and "ADHD"). 28.RR.157, ROA.7000.

The jurors returned a verdict requiring imposition of the death penalty. 29.RR.62, ROA.7093.

D. State Habeas Proceedings[5]

On April 24, 2007, the trial court appointed Karyl Krug to represent Mr. Tabler for direct appeal and David A. Schulman (and later John Jasuta) to represent him for state habeas proceedings.[6] ROA.3642. Throughout their seventeen-month

[5] This account of the state habeas proceedings relies on court records, the transcript of the waiver hearing conducted on September 30, 2008, and documents from state habeas counsel's files. The legal argument below explains why the district court could have allowed development of the extra-record evidence.

[6] Mr. Schulman played the leading role in the team's limited contact with their client, which consisted almost entirely of a mostly one-sided correspondence from Mr. Tabler to counsel. The ensuing discussion accordingly refers primarily to actions and failures to act by Mr.

state-court representation, Mr. Tabler repeatedly told Mr. Shulman that he wanted to waive his state habeas litigation, and then repeatedly changed his mind. Mr. Shulman never explained that his direct appeal and state habeas petition would move simultaneously on parallel tracks and that he could make a binding waiver of state habeas proceedings, and even receive an execution date, before the CCA decided the direct appeal. *See* Tex. C.C.P. Art. 43.141(a)(2), (b). Instead, he described the waiver deadline as a time "after" the direct appeal had ended. Ms. Krug's communications reinforced the same inaccurate impression. Mr. Tabler's correspondence and in-court statements show his misunderstanding of his situation: he repeatedly said he would waive "after my direct appeals."

On October 29, 2007, Schulman filed an ex parte motion seeking funds for the "preliminary services" of an investigator and mitigation specialist. ROA.1245. The court authorized the retention of investigator Rick Ojeda and mitigation specialist Beth Ann Larsen on February 5, 2008. ROA.1253-56. On March 10, 2008, Beth Larsen wrote to Schulman with her initial report, based on record review, identifying numerous avenues for further investigation. She recommended personal interviews, investigation of Mr. Tabler's substance abuse problems, neuropsychological testing, and further assessment of the trial experts' testimony.

Schulman. Both he and Mr. Jasuta, however, had a constitutional obligation to Mr. Tabler, and both bear responsibility for the ineffective assistance they jointly provided.

ROA.1270. Larsen met with Mr. Tabler a month later but conducted no further investigation. To that point, she had spent approximately thirty hours attending to preliminary matters—visiting Mr. Tabler once, reviewing the trial record, and speaking with Mr. Shulman. ROA.1272. What remained to be done were the actual tasks of investigation. As Mr. Schulman's May 1, 2008 request for more funds made clear, Larsen had yet to interview any witness beyond her single meeting with Mr. Tabler. ROA.1274. Yet the court never approved counsel's additional request, and Ms. Larsen ceased work on the case.

Meanwhile, beginning in March 2008, Mr. Tabler wavered back and forth about whether he would pursue postconviction proceedings. Over the next six months, he repeatedly changed his mind, as documented in correspondence between him and Shulman and also between Shulman and Krug:

- 3/20/08: continue state habeas (ROA.1280).
- 3/31/08: drop "all my appeals after my direct appeal" (ROA.1282).
- 4/5/08: continue state habeas (ROA.1286).
- 5/15/08: not sure if will continue appeals "after my direct appeal" (ROA.1294).
- 6/2/08: drop "all my appeals after my direct appeal" (ROA.1296).
- 7/2/08: waive appeals "after my direct appeal" (ROA.1306)
- 7/28/08: will "ride these appeals out with both of you" (ROA.1309).

On June 6, 2008, Mr. Schulman had an ex parte conversation with Judge Trudo. As he explained in an email to Beth Larsen, Judge Trudo indicated that "[s]he is already very reluctant to spend more money, but did express a willingness to do so." ROA.1298. According to Schulman, "We had a conversation about our client's stated intent to end all appeals. I told her that this was one of the reasons I needed to have him examined by Dr. Harrison." ROA.1298. This disclosure led the court to come to an unrecorded, ex parte decision to "sit on" Schulman's investigative funding request pending a competency examination. ROA.1298-1300. On June 9, Judge Trudo authorized $2000 for Dr. Harrison to "conduct[] a neuropsychological evaluation appropriate in assisting counsel for the Defendant in the preparation of the defense." ROA.1301. But, as Mr. Schulman told Dr. Harrison, Judge Trudo also expected him to provide an opinion on Mr. Tabler's competence. ROA.1304.

On June 27, 2008, Dr. Harrison visited Mr. Tabler in prison. Mr. Tabler wrote Mr. Schulman on July 2 that the visit had gone well, Dr. Harrison would likely find him competent, and he still wanted to "drop my appeals after my direct appeal." ROA.1306. In response, Schulman reiterated, inaccurately, that the decision whether to waive could have no "real effect" until the CCA decided Mr. Tabler's direct appeal. ROA.1307-08. On July 28, Mr. Tabler wrote: "I'll tell you what, I'll try and ride these appeals out with both of you." ROA.1309.

Also on July 28, 2008, Schulman received a two-page letter from Dr. Harrison, directed only to the question of competence. ROA.1311. Dr. Harrison found that Tabler was "forensically competent to make decisions to suspend his automatic appeal." In contrast to what Mr. Tabler had reported to Schulman after Dr. Harrison's visit, Dr. Harrison reported that at the time of his interview on June 27, Mr. Tabler "expressed a desire to continue the appeal process." ROA.1312.

On August 1, 2008, Schulman discussed the news of his client's latest decision to "ride out" the legal process with the court, his defense team and his client. First, he wrote Judge Trudo that Mr. Tabler had agreed not to "do anything until after the CCA [] acted on his direct appeal," and that Schulman would proceed with his investigation. He renewed his request for mitigation funding. ROA.1313. A month passed with no further investigation. Schulman told Larsen that the case was "stalled" awaiting further funding for mitigation investigation from the court. ROA.1320. In the month since Schulman declared that the case was "still a 'go,'" he himself did less than an hour of work on the case. ROA.1201. From April 1 to September 1, he had done twenty-one hours of work on Mr. Tabler's death penalty case, or about one hour per week. He spent none of that time obtaining records, conducting interviews, or researching and developing claims. ROA.1200-01.

On August 11, 2008, Mr. Tabler wrote to the CCA asking to "drop my appeals and get an execution date." ROA.1793. Judge Trudo and Mr. Shulman received

copies of this letter a few weeks later, and the court scheduled a hearing that it ultimately held on September 30.

Meanwhile, however, Schulman received Dr. Kit Harrison's full, eighteen-page report on his neuropsychological evaluation. "Although being oriented in all spheres," Dr. Harrison remarked, Mr. Tabler "demonstrates a rapid-cycling mood destabilization with strong evidence of Bipolar Disorder, Type I":

> He demonstrates full-blown manic and euphoric ideation which is evident during interview, coupled with obvious rapid-cycling depression, suicidality, intermittent explosiveness, and surging anger with a moment's notice. Thus, he is currently thought to be a danger to himself and others. . . . Although there is a clearly manipulative and attention-seeking element to Mr. Tabler's overt statements of homicidality, he does describe compulsive desires to injure himself and others. This is thought to be, in part, due to a highly paranoid and delusional worldview of chronic duration. He gets so expansive, euphoric, and grandiose with drugs, or without drug intoxication, that he loses touch with reality. It is noted he is currently off antipsychotic medication.... He is mildly psychotic.

ROA.1493. In passing the report along to his defense team, Schulman highlighted one of the concluding passages, which reiterated that his client acted under the influence of "deep and severe constellation of mental illnesses [that] have been disabling and debilitating for him since at least early adolescence and have never been adequately managed from a medical or psychological standpoint." ROA.1324. Counsel never provided this report to the court or even indicated that it existed.

On September 15, 1998, two weeks before the state habeas court conducted a hearing to address Mr. Tabler's competency, Mr. Tabler cut his left inner elbow joint

with a razor blade, "transecting his antecubital fossa" and requiring sutures. ROA.1794.

On September 30, 2008, the trial court conducted a brief hearing, covering only fifteen transcript pages, on Mr. Tabler's competency. 1.RR.357-69, ROA.3096-108. Attorneys Schulman and Jasuta purposefully abdicated any role. Mr. Schulman announced that, while present for the proceeding, "we do not announce ready[] because we do not intend to take a position one way or the other of what should happen today." *Id.* at 357, ROA.3096. Counsel took no position in the ensuing colloquy between Mr. Tabler and the court. Nor did counsel object when the court advised him, incorrectly, that his state habeas proceeding would take place sequentially, after direct appeal, instead of simultaneously with the direct appeal, as Texas law actually requires. *See* Tex. Code Crim. Proc. art. 11.071 § 4(a); ROA.359-61, ROA.3098-100. The court did not explain when "the time period [would] run to file the writ" or indicate that this time could expire well before the CCA issued its direct appeal decision. Mr. Shulman and Mr. Jasuta sought and received the court's assurance that it would relieve them from any further obligation to investigate the case and would not provide any further funding. *Id.* at 366-68, ROA.3105-07.

The State filed its brief on direct appeal on October 1, 2008. State's Brief, *Tabler v. State*, 2008 WL 5191415 (Tex. Crim. App. Oct. 1, 2008). This triggered a forty-five-day deadline for Mr. Tabler to file his state habeas petition. Tex. Code

Crim. Proc. art. 11.071, § 4(a).[7] Mr. Schulman and Mr. Jasuta had no contact with Mr. Tabler between the date of the hearing and the date his time to file expired. On June 9, 2009, too late to file a state habeas petition but several months before the direct appeal decision, which Mr. Schulman and Mr. Jasuta had incorrectly told him would trigger his habeas petition deadline, Mr. Tabler wrote the trial court asking to "pick up" his habeas corpus proceedings. ROA.1369. The letter was forwarded to the CCA and Mr. Schulman.

On July 14, Mr. Schulman and Mr. Jasuta filed a motion to resume representation and establish a new filing date. ROA.1941. The motion argued that "despite his competency and his stated understanding of the fact that his decision to dispense with his habeas corpus action, Applicant should not have been permitted to make that decision." ROA.1941. As a result of his "on again, off again" desires to waive, counsel argued, Mr. Tabler should be entitled to file an untimely application as set out in Tex. Code Crim. Proc. art. 11.071 § 4A(b). ROA.1941. The CCA denied the motion. *Ex parte Tabler*, No. WR-72,350-01 (Tex. Crim. App. Sep. 16, 2009), ROA.3287. The CCA concluded that Mr. Tabler had not shown good cause because "the failure to file . . . is attributable to Applicant's own continued insistence on foregoing any such remedy."

[7] November 15, the forty-fifth day after October 1, fell on a Saturday in 2008, advancing the due date to the next business day, Monday, November 17.

E. Federal Habeas Proceedings

On December 16, 2009, the CCA denied relief on Mr. Tabler's direct appeal. ROA.1020. The district court appointed Mr. Schulman and Mr. Jasuta as federal habeas counsel and stayed Mr. Tabler's execution on February 25, 2010. The court administratively closed the case pending a decision on Mr. Tabler's petition for writ of certiorari. *Tabler v. Stephens*, No. W-10-CA-034, ECF No. 6 (W.D. Tex. Feb. 25, 2010). Over the course of 2010 and 2011, Mr. Tabler again wavered about whether to continue litigating his case. When he sought to withdraw his already-filed petition for certiorari, his counsel moved to reopen federal habeas proceedings and at the same time moved for a competency hearing. ROA.81. The court appointed Dr. Richard Saunders, a licensed psychologist, to perform a psychological evaluation. ROA.86. Dr. Saunders found Mr. Tabler competent to waive further proceedings but concluded that his desire to waive was primarily due to his conditions and the perceived mistreatment Mr. Tabler reported receiving from prison staff and other inmates. ROA.1506-17.[8]

[8] In October 2008, Mr. Tabler called Texas State Senator John Whitmire using a contraband cell phone from inside the prison. Sen. Whitmire reported that Mr. Tabler requested help finding a pro bono attorney to pursue his appeals and revealed that he knew information about the Senator's family members. Mr. Tabler was arrested, and the Governor ordered a statewide lockdown and investigation of cell phone possession throughout the Texas Department of Criminal Justice. Mr. Tabler was hospitalized at the Jester IV psychiatric facility and placed on suicide watch. Once released, he was housed under hyper-isolation conditions in the Death Watch unit. Hearing Before the S. Comm. on Crim. Just., 80th Legislature, Interim Sess. (Tex. Oct. 21, 2008) (statement of Sen. John Whitmire, Chair), http://tlcsenate.granicus.com/MediaPlayer.php?clip_id+1203 (video at 6:04-6:20, 5:18-5:38);

After an evidentiary hearing, the district court entered an order finding Mr. Tabler competent to waive but finding his waiver involuntary. ROA.126-30. In addition to relying on Dr. Saunders's report detailing Mr. Tabler's reports of abuse and persecution by prison staff, the court noted that, in a letter to counsel, Mr. Tabler had stated that prison guards were trying to kill him. The court found that Mr. Tabler believed his family would be harmed by TDCJ personnel if he did not volunteer for execution. ROA.130. Thus, the waiver was not voluntary. The court ordered Mr. Tabler's case reopened, and counsel filed his petition for writ of habeas corpus. ROA.182.

On February 9, 2012, the district court denied Mr. Tabler's petition. ROA.446. Mr. Schulman and Mr. Jasuta filed a motion to alter or amend judgment under Rule 59, arguing in part that their own state court performance, which resulted in a "lack of an adversarial process," should provide cause for their client's failure to raise claims. ROA.478-80. They also moved to withdraw on the ground that new counsel needed to offer unconflicted arguments about the impact of *Martinez*, 566 U.S. 1, on the court's decision. The motion contended that *Martinez*, decided just nine days earlier, might "provide[] a legal avenue . . . to pursue procedurally defaulted claims

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Press Release, Gov. Rick Perry Directs Texas Board of Criminal Justice to Take Immediate Action on Prison Security (Oct. 20, 2008), http://web.archive.org/web/20081025133900/http:///governor.state.tx.us/news/press-release/11447/.

in federal court by arguing that state habeas counsel were ineffective." ROA.496-97. The district court initially denied the Rule 59 and withdrawal motions, but later appointed new counsel for appeal. ROA.500-02, ROA.522-24.

After initially denying a COA, *see Tabler v. Stephens*, 588 F. App'x 297 (5th Cir. 2014), ROA.1003, this Court granted rehearing and remanded to the district court with instructions:

> solely to consider in the first instance whether Tabler, represented by his new counsel Widder or other unconflicted counsel, can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief.

Tabler v. Stephens, 591 F. App'x 281 (5th Cir. 2015), ROA.1019.

On remand, Mr. Tabler's new counsel filed an amended petition, supported by a thousand-page appendix containing court records, witness statements, emails and correspondence, social history records, a thirty-five-page life history prepared by a licensed social worker, and seven expert reports. ROA.710, ROA.992. A supplemental appendix, filed on January 25, 2016, contained the declarations of twenty-four lay witnesses and experts, and the declaration of trial counsel's neuropsychologist. ROA.2478-2542. Mr. Tabler filed motions for discovery, a stay and abeyance, and an evidentiary hearing, all of which the district court later denied. ROA.2029-70, ROA.2671, ROA.2721-27.

Before the district court had ruled on the motions or the petition, Mr. Tabler sought to waive further "appeals." *See, e.g.*, ROA.2543. The court appointed Dr. Michael Arambula to evaluate Mr. Tabler's competency and held an evidentiary hearing on July 9, 2018, to determine whether he understood his options, had made a voluntary decision, and was free of any mental disease or defect that might interfere with his ability to make a knowing choice. ROA.7685. The court questioned Mr. Tabler about his understanding of the consequences of abandoning his habeas proceedings and his reasons for his request. ROA.7685-7712. Dr. Arambula testified that, in his view, Mr. Tabler's frustration with his conditions of confinement was not "causally related" to a symptomatic mental condition that would interfere with capacity. ROA.7726-29. He nevertheless acknowledged that Mr. Tabler suffered from Klinefelter's Syndrome ("KS"), had fetal alcohol exposure, had repeatedly cut himself, and had a "waxing-waning mood disturbance." ROA.7741-46, ROA.7783-85.

Mr. Tabler also presented expert testimony regarding his competency. Psychiatrist Richard Dudley testified that Mr. Tabler's constellation of disorders prevented him from making a voluntary decision on waiver. First, his KS, a chromosomal abnormality associated with a variety of neuropsychiatric difficulties, best explained the severe anxiety he had suffered since childhood. ROA.7799. His borderline personality disorder ("BPD") was associated with broad-based instability

of relationships, self-worth, mood, and decision-making. ROA.7799-802. He had neuro-cognitive impairments related to FASD and a history of head injuries. ROA.7803. With these pre-existing ailments—KS, FASD, BPD, trauma history—authorities had placed him into an environment defined by the kinds of stresses to which he was most vulnerable, like isolation and loss. He became overwhelmed by his feelings and acted to get himself out of the situation by cutting himself and waiving his legal rights. "The waiver puts an end to the fear of exploding." ROA.7804-09. Dr. Dudley concluded that Mr. Tabler was unable to make a voluntary decision to waive. ROA.7812.

Neuropsychologist Daniel Martell found a pattern of deficits in neuropsychological testing consistent with the pattern he would expect to see in cases of KS—attention deficits and learning disabilities, deficits in verbal intellectual abilities, and problems in frontal lobe functioning. ROA.7835. The two batteries of tests previously administered by other neuropsychiatrists showed the same pattern. ROA.7835-36. Mr. Tabler showed "hallmark signs of frontal lobe impairment": he was cognitively rigid, unable to pay attention to more than one thing at once, unable to adapt to change, and prone to perseveration and confabulation. ROA.7839. He also had fetal alcohol dysfunction, which contributed to his cognitive impairment. ROA.7841. Dr. Martell concluded that Mr. Tabler was not capable of making a voluntary decision to forego his appeals. ROA.7848.

Finally, Dr. Keith Curry, a clinical psychologist with extensive experience working in prisons and jails, stressed that both FASD and KS have direct effects on brain development during childhood. ROA.7857-60. As a result, Mr. Tabler suffered from poor executive functioning, meaning that he is "easily tipped over into an entirely different state . . . in a highly reactive way" and extremely prone to "temporal discounting," "assigning more weight to rewards and punishment in the present." ROA.7861-62. Dr. Curry explained that "it looks like there's no future cost that he won't trade off for some current gain, some current escape or some benefit." ROA.7862. His "variability" was an "essential characteristic and a lifelong trait." ROA.7867. Dr. Curry believed that Mr. Tabler could not make a voluntary waiver because of his "inability to weigh future consequences meaningfully against the present[.]" ROA.7874.

The court allowed Mr. Tabler a ten-minute non-contact visit with his mother, whom he had not seen in eleven years, at the end of the hearing. ROA.7899. The next day, he asked his attorneys to withdraw his request to waive, and the court accepted his request. ROA.2983-3002.

F. The Evidence That Could Have Been Developed and Presented at Trial and in State Habeas Proceedings[9]

If trial or state habeas counsel had conducted an independent social history investigation, they could have compiled a complete account of Mr. Tabler's background and upbringing. With that account, along with the evidence they already possessed, they could have obtained opinions from medical and mental health experts that would have supported trial counsel's chosen strategy and enabled state habeas counsel to demonstrate IATC.

1. Background Evidence

Prior counsel never learned the full, highly mitigating story of Mr. Tabler's birth, upbringing, and youth. Before trial, Lorraine Tabler and Kristina Martinez (Richard Tabler's mother and sister) received one visit from a defense team member, and on one occasion met with trial counsel, Mr. Harris, at his office. Robert Tabler (Richard Tabler's father), Lorraine, and Kristina each received a phone call from a defense expert and attorney Hunt. Otherwise, no potential witnesses had any contact with any member of his defense until 2015.

[9] This section summarizes evidence gathered during federal habeas defense review. Point I below explains why this Court can consider the evidence to determine whether state habeas counsel's ineffectiveness excused any default and whether trial counsel rendered ineffective assistance. Point II below explains the relevance of the evidence to the IATC claim before the Court.

In the district court, Mr. Tabler proffered the 2015 report of mitigation investigator Colleen Francis, which details readily available evidence, gleaned from collection and review of records and interviews of many witnesses, that counsel could have uncovered at the time of trial. ROA.1428. He also proffered declarations from eighteen family members and friends who knew Mr. Tabler from birth through adulthood and would have been willing and available to testify about their personal knowledge at trial. ROA.2478. These materials demonstrate what trial counsel could have shown the jury and state habeas counsel could have shown the court.

First, counsel could have provided compelling background evidence. Richard Tabler was born to parents who were able to provide their children with a roof over their heads, food on the table, and clothing to wear, along with some frills. For most children, that would have been enough—and for his older siblings, it was enough—to grow into capable adults. But Richard was not like most children. He was born with two independent congenital birth defects, KS and FASD. Both prevented his brain from developing normally in utero, and each triggered other hormonal, developmental, and physical problems. He grew extremely tall, although his father and brothers are short men. His voice never changed and his beard never developed. ROA.1443. He had early, severe, dental problems. Most significantly, Richard displayed from his earliest years a profound inability to control emotions or impulses. He suffered tantrums and wild mood swings, like a toddler, long after he

had stopped being a toddler. He could not learn appropriate social interaction skills and often behaved in inappropriate ways. ROA.1444-46.

Richard was slow to walk and so slow to talk that adults assumed he was deaf or intellectually disabled. He had poor hygiene, resisting showers and brushing teeth. He sucked on two fingers almost constantly from infancy until well into his teens. He wet the bed until he was eight. ROA.1442-44. He laughed or showed no reaction to beatings or scoldings. ROA.1445. With one exception, Richard received failing grades in each semester throughout his secondary school years. On standardized tests he took in the ninth grade, he scored at the lowest fifth percentile or lower compared to students nationally. ROA.1451-52. Richard developed mental health symptoms early, landed in emergency rooms and mental health treatment facilities many times beginning in early adolescence, and began abusing drugs and alcohol at an early age. He made many documented, bloody, and dramatic suicide attempts. ROA.1453-69.

Richard's family could not handle him, and eventually they gave up trying. His parents' marriage, buffeted by infidelity, heavy drinking, violence, and neglect of the children, fell apart when Richard was nine. His mother moved in and out of the home and later around the country. His father and older siblings gave Richard little supervision. The unhealthy family dynamics interacted with Richard's congenital defects to spawn secondary disorders. Professionals who evaluated him in his teens and twenties, including prison professionals with no reason to exaggerate

his problems, diagnosed bipolar disorder, borderline personality disorder, and severe attention deficit disorder.

Richard's mother twice let Richard live with her as a teenager, but she quickly gave up on him and sent him back to his father. His father got him counseling and shuttled him in and out of schools, but by the time Richard was seventeen had shifted him from home to residential treatment and then to an apartment of his own, where he expected Richard to live independently as an adult. Richard could not do it. By his early twenties he was homeless, his arms bore the scars of cutting, he had made numerous documented suicide attempts, his upper teeth had rotted and fallen out, and he had fallen into alcohol and drug abuse. ROA.1453-56-58, ROA.1460, ROA.1465-66.

In addition to all Richard's other medical and mental disorders, he suffered several documented head injuries, including a severe, documented concussion, with facial fractures, two months before the offense. ROA.1471-72.

2. Medical and Mental Health Evidence

Thorough background investigation and trial preparation could have informed trial counsel's mental health presentation, and could have led them to secure appropriate *medical* evaluations. Trial counsel—and therefore the jury—never learned that Mr. Tabler suffers from KS and FASD. The mental health experts whom trial counsel consulted, three of whom testified at trial, were unaware of these

diagnoses and of the background information that an independent social history investigation would have revealed.

a. Klinefelter's Syndrome

Mr. Tabler has a distinctive appearance. He is tall, with an extremely thin and undeveloped build, elongated fingers, a high-pitched speaking voice and laugh, and little facial hair. ROA.1591 (Martell report); ROA.1634 (Davies report); ROA.1651 (Dudley report). These features are telltale signs of Klinefelter's Sydrome or KS (also called 47,XXY Syndrome). Carole A. Samango-Sprouse, Ed.D., a published expert in the syndrome, recommended in 2015 that Mr. Tabler receive chromosomal testing. The testing, completed on August 14, 2015, determined definitively that Mr. Tabler possesses an extra X chromosome and has KS. ROA.1603,1611.

Klinefelter's Syndrome is a neurogenetic disorder characterized by deficient production of the androgen class of hormones, which affect all aspects of central nervous system development from prenatal life through adulthood. ROA.1603. It can have a debilitating effect on neurological, social, and intellectual development:

> Multiple behavioral manifestations and central nervous system dysfunctions are commonly associated with this syndrome, if untreated, including decreased impulse control, heightened anxiety, mood lability, low frustration tolerance, depression, and executive function impairment. Richard Tabler has many if not all of these symptoms[.]

ROA.1603.

Young Richard's atypical development left him vulnerable to abuse. And the neglect and abuse had a more severe impact on him than it would have on a typically developing child because of the emotional dysregulation, anxiety, and depression to which his disorder made him susceptible. ROA.1604. Mr. Tabler's multiple documented suicide attempts, suicide threats, and episodes of self-harm reflected the heightened anxiety highly associated with Klinefelter's. ROA.1605. Dr. Samango-Sprouse concluded that Mr. Tabler's "very, very late" diagnosis (not until 2015) and chaotic childhood "compromised his outcome tremendously" and may have significantly compromised his judgment. ROA.1606.

b. Fetal Alcohol Spectrum Disorder

At the time of trial, counsel could have consulted experts such as Natalie Novick Brown, Ph.D., and Julian Davies, M.D. Dr. Brown is a clinical and forensic psychologist with specialized training and experience in fetal alcohol spectrum disorders ("FASD") and the program director and chief psychologist at FASDExperts. ROA.1517, ROA.1562. Dr. Davies is a board-certified pediatrician, a fellow of the American Academy of Pediatrics, a clinical professor of pediatrics at the University of Washington School of Medicine, and an FASD specialist. ROA.1621, ROA.1642.

FASD "is the umbrella term for conditions arising from prenatal brain damage to a developing embryo or fetus caused by maternal drinking during pregnancy."

ROA.1521. It has a worldwide diagnostic history spanning over 40 years. Diagnostic criteria have existed in the literature since the late 1970s, and the Institute of Medicine, an arm of the National Research Council, published criteria in 1996. ROA.1552-56. The University of Washington published a widely used four-digit diagnostic code for FASD in 2000. ROA.1622.

At one end of the FASD spectrum is Fetal Alcohol Syndrome ("FAS") characterized by prenatal and/or postnatal growth deficiency, facial anomalies, and central nervous system ("CNS") abnormalities. ROA.1621. Also on the spectrum is Static Encephalopathy – Alcohol Exposed (University of Washington terminology) or Alcohol Related Neurodevelopmental Disorder ("ARND") (Institute of Medicine terminology), which does not involve facial abnormalities or growth delay, but does involve confirmed maternal drinking and CNS abnormality. ROA.1622. The vast majority of those on the FASD spectrum have ARND. ROA.1522. Mr. Tabler falls on the FASD spectrum and has ARND.

In 2015, Dr. Novick Brown conducted a five-hour evaluation of Mr. Tabler, administered tests, and reviewed records, including school, medical, mental health, and correctional records; the records of neuropsychological testing conducted during trial preparation and during state habeas proceedings; and the report on an EEG test conducted before trial. ROA.1518-20. She identified robust indications, in the evidence possessed by trial counsel in 2007 that Mr. Tabler suffers from FASD.

Among other factors, his father reported to Dr. Henigan, Mr. Tabler's treating psychiatrist, that his mother drank alcohol during her pregnancy; his school performance was extremely poor from elementary grades; he achieved abnormal results on EEG and neuropsychological testing; and reporters described many instances of poor executive function. A.1539-45.

Dr. Brown explained:

> [A]t the time of trial, not only did Dr. Milam's test results provide neuropsychological evidence of functional impairments in cognitive domains directly relevant to offense conduct (i.e., executive functioning), those test results were consistent with Dr. Proler's EEG report in 2005, which provided reliable *independent* evidence of neurological dysfunction and probably brain damage in the areas of the brain that control executive functioning and consequential adaptive behavior (e.g., learning and social conduct). School records (which contained consistent evidence of a severe learning disability and executive functioning problems) and medical records (which contains evidence of adaptive coping deficits such as ongoing thumb sucking, temper tantrums, truancy because he was "afraid of school" and "afraid of writing in front of others") were consistent with both the neuropsychological test results and the EEG report.

ROA.1545-46 (emphasis original). The records in trial counsel's possession also set forth a history consistent with the "secondary disabilities" common among individuals with FASD: failure to complete school, trouble with the law, substance abuse problems and complex mental health problems, inability to live independently, and inability to maintain employment. ROA.1546-47.

Trial or postconviction counsel could also have consulted a medical doctor qualified to conduct an FASD assessment. In 2015, Dr. Davies conducted a physical

examination and evaluation, reviewed the reports of Drs. Brown, Samango-Sprouse, Proler, Milam, and Harrison, and reviewed records. ROA.1623-24, ROA.1631-34. He concluded that Mr. Tabler has brain damage consistent with Static Encephalopathy / Alcohol Exposed or ARND. This is a diagnosis under the umbrella of FASD. ROA.1622, ROA.1636.

Dr. Davies noted the reports and documentation indicating that Lorraine Tabler drank during her pregnancy with Richard (ROA.1624), and identified multiple indicia of CNS abnormality. Some of the evidence was structural: Mr. Tabler's 2005 EEG exam was abnormal, and he had microcephaly (an abnormally small head) at birth, with a head circumference at the 0 percentile. His head circumference currently, measured by Dr. Davies, is at the third percentile. ROA.1625, ROA.1629, ROA.1637. Other evidence was functional. Dr. Davies reviewed the neuropsychological test results of Dr. Milam (conducted before trial, in 2006), Dr. Harrison (conducted during state habeas proceedings, in 2008) and Dr. Daniel Martell (conducted in 2015). ROA.1629-30, ROA.1585. Collectively, these test results and other records demonstrated brain dysfunction in many domains: attention, learning, intellectual functioning, executive functions, memory, language, visuospatial integration, and motor function. Mr. Tabler also demonstrated social misjudgment during his interview, with "an unusual mix of goofy . . . adolescent

humor mixed with braggadocio" and distractibility, interrupting answers to mug for officers outside the interview room. ROA.1633.

Dr. Davies explained that Mr. Tabler's impaired adaptive functioning is also typical of FASD:

> It is important to note that the gap between some of Mr. Tabler's more intact testing scores (such as Performance IQ), his lower-than-predicted grades, and his very dysfunctional young adult outcomes fits a pattern frequently seen in people with ARND. They can perform at a relatively higher level in a one-on-one, focussed [sic] testing environment, but have trouble translating that performance into the more complex environment of school, and have even more difficulty using their mental capacities in the less-structured life of an adolescent/young adult. They can perform more basic, rote skills but when complexity is introduced, or the need for abstract thought, interpretation, or judgment, their adaptive "real world" performance can be surprisingly impaired.
>
> Individuals like Mr. Tabler with ARND rather than full-blown FAS, and those with normal IQ rather than intellectual disability, are actually at higher risk for adverse life outcomes like confinement. This may be because they are less likely to receive an early diagnosis and appropriate supports, and go through life with an "invisible disability."

ROA.1637-38.

Dr. Davies also agreed with Dr. Samango-Sprouse that Mr. Tabler has KS and explained that it shares many common features with FASD. Significantly, in both, affected individuals are sensitive to the impact of risk factors in their environment:

> It is not scientifically possible to definitively state what neurobehavioral deficits are due to KS versus FASD in Mr. Tabler, as both syndromes are variable in their impact and share common features: language and verbal processing difficulties, impulsivity, executive dysfunction, emotional lability, learning problems, and social

> challenges. These syndromes also share a sensitivity to environmental risk factors. . . .
>
> While it is tempting to choose the most parsimonious explanation for a patient's presentation, I do not find KS sufficient to explain his outcomes, and a diagnosis of KS *and* FASD is the best explanation for Mr. Tabler's medical and neurodevelopmental features.
>
> These diagnoses are indeed compatible - KS is a sex chromosome anomaly present from earliest gestation, and alcohol exposure during pregnancy compounds the genetic risk.

ROA.1639-40. Any qualified FASD professional could have reached this diagnosis at the time of Mr. Tabler's trial. ROA.1641.

c. Psychiatric Evaluation

The defense could also have consulted and presented the testimony of a psychiatrist who was armed with the results of an independent social history investigation *and* the opinions of experts in Mr. Tabler's medical disorders. Richard Dudley, M.D., conducted such an informed assessment. Dr. Dudley is a licensed physician board-certified in psychiatry by the American Board of Psychiatry and Neurology. In 2015, he conducted an in-person psychiatric examination of Mr. Tabler and reviewed transcripts, records, the social history report of Colleen Francis, and the reports of Drs. Samango-Sprouse, Novick Brown, Davies, and Martell. ROA.1647-48.

Dr. Dudley found that the combined effect of Mr. Tabler's disorders was greater than their sum:

> [F]rom birth Mr. Tabler suffered from FASD and Klinefelter Syndrome. Given the effects of those difficulties on the development of his brain and available information on his neurocognitive development during his childhood years, it is reasonable to say that he also suffered from intellectual and other cognitive deficits during his childhood years, possibly made worse by later additional insults to his brain. As a child he also suffered from psychological and physiological trauma-related difficulties. In addition, he suffered from a range of difficulties with psychological development resulting in the development of personality characteristics characterized by instability in multiple important areas of functioning, including attachment, his sense of self, and his mood, as well as impulsivity and self-destructive behaviors. Then in addition, Mr. Tabler's early self-medication with various substances quickly developed into substance abuse difficulties. Furthermore, he eventually also suffered from a Bipolar Disorder, with psychotic features.
>
> Given that Mr. Tabler has been previously described as suffering from Antisocial Personality Disorder, it should be noted here that the constellation of difficulties with psychological development and the resultant personality difficulties found by this psychiatrist are best described as Borderline Personality Disorder. This psychiatrist did not find that Mr. Tabler exhibited the characterological difficulties seen in persons suffering from Antisocial Personality Disorder. Furthermore, it is the opinion of this psychiatrist that any antisocial behavior that Mr. Tabler has exhibited is more appropriately attributed to/the direct result of the combination of his other, above noted psychiatric and neuropsychiatric difficulties.

ROA.1654-56. Dr. Dudley observed that, because some of Mr. Tabler's impairments went undiagnosed at trial, it was necessarily impossible for the trial experts to assess the combined effects of all of them. ROA.1656.

As discussed in detail below, none of the social history or expert opinion evidence set forth in this section was available to the jurors, the state court, or this

Court in any of the previous litigation in this case. It was available to prior counsel, but they did not uncover it.

SUMMARY OF ARGUMENT

This case presents this Court with a procedural question and a substantive claim. First, the Court remanded appellant Richard Tabler's case to the district court to determine whether his state habeas counsel's ineffectiveness at the time Mr. Tabler was allowed to waive his state habeas rights excused the default of substantial IATC claims. *Tabler v. Stephens*, 591 F. App'x. 281 (5th Cir. 2015) (citing *Christeson*, 574 U.S. 373; *Martinez*, 566 U.S. 1), ROA.1019. On remand, the district court rejected Mr. Tabler's procedural arguments without a hearing, but granted COA on one of them: whether counsel's failure to challenge his competency to waive his rights excused the default under *Martinez*. ROA.7506.

Shortly after Mr. Tabler filed his notice of appeal from the district court's denial of relief, the Supreme Court decided *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). *Ramirez* held that a petitioner "fails to develop" the facts of a claim in state court, and therefore cannot obtain federal evidentiary development except under narrow exceptions, if his state postconviction counsel's negligent ineffectiveness is responsible. *See* 28 U.S.C. § 2254(e)(2). The linchpin of this ruling was the agency relationship between attorney and client. As the Supreme Court recognized in *Maples v. Thomas*, 565 U.S.266 (2012), however, an attorney's abandonment severs

the agency relationship and relieves the client of the consequences of attorney error. In that event, § (e)(2) poses no obstacle to a habeas petitioner who seeks to develop facts not presented in state court. *Ramirez* suggests that an attorney's extraordinarily deficient performance also severs the agency relationship.

Applying the § (e)(2) limitation to Mr. Tabler's case would also violate the Suspension Clause of Article I, § 9, and the Due Process Clause of the Fourteenth Amendment. Although Congress has substantial authority to regulate the scope of habeas and provide alternative mechanisms, it cannot create procedures that foreclose review of entire categories of claims. *Ramirez* would make review of most IATC claims effectively unavailable to petitioners whose state postconviction counsel failed to advance them. This would suspend the writ, at least for a petitioner like Mr. Tabler whose postconviction counsel abandoned him in state court. *See Boumediene v. Bush*, 553 U.S. 723 (2008). For a petitioner like Mr. Tabler, moreover, denying a hearing on a well-pleaded IATC claim would violate due process.

In Mr. Tabler's case, not only does the state court record show that his attorneys' explicit refusal to function as advocates during his waiver hearing constituted abandonment and extraordinarily deficient performance, but other extra-record evidence from counsel's files provides further support for those characterizations. An eighteen-page expert report, and other evidence, shows that

reasonably effective advocacy could have demonstrated the invalidity of Mr. Tabler's efforts at waiver. Section 2254(e)(2) therefore posed no obstacle to an evidentiary hearing at which Mr. Tabler could have demonstrated that his attorneys' conduct excused the default of his federal claims. The district court erred in denying relief without a hearing.

Mr. Tabler also seeks, in a contemporaneously filed application, to expand COA to allow this Court to consider all the reasons state habeas counsel's conduct excused any default of his federal claims. *See Application to Expand COA*, § I.

The district court also granted COA on one substantial IATC claim. At the penalty phase, the prosecution presented emotional testimony from relatives of the victims of two unadjudicated homicides. Because the indictment did not name those victims, the testimony was unequivocally inadmissible under Texas law, but trial counsel raised no objection. *See Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997). Their failure to advocate for their client on the basis of the applicable law was deficient performance. *See, e.g.*, *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Moreover, the evidence had a highly prejudicial impact: the grandmother and stepmother of the two deceased women described their tragic lives, their affectionate personalities, and the emotions their killings aroused in their families and communities. There is a reasonable probability that these accounts exerted a strong pull on the jurors' emotions and meant the difference between life and death.

The testimony and counsel's failure to object appear on the face of the state court record, and in any case, as explained above, § 2254(e)(2) does not bar evidentiary development of Mr. Tabler's federal claims. The district court erroneously denied relief without holding a hearing.

In his contemporaneously filed application, Mr. Tabler seeks to expand the COA to allow this Court to consider all the grounds supporting his substantial claim that his trial counsel rendered ineffective assistance at his penalty phase, along with this ground. In addition, he asks this Court to review the district court's erroneous rejection of the IATC claims as "sheer speculation" because it overlooked Mr. Tabler's submission of twenty-four declarations supporting his factual allegations. Reasonable jurists could debate whether the district court erred and whether Mr. Tabler's proffer demonstrated his entitlement to an evidentiary hearing. *See Application to Expand COA*, § II.

ARGUMENT

I. STATE HABEAS COUNSEL'S ABANDONMENT AND DEFICIENT PERFORMANCE RESPECTING WAIVER EXCUSED THE DEFAULT OF MR. TABLER'S STATE HABEAS RIGHTS.

A. The Law of Procedural Default

This Court remanded Mr. Tabler's case to allow the district court to consider whether, as contemplated in *Martinez,* state habeas counsel's ineffective assistance excused the default of a substantial IATC claim. The Supreme Court's recent decision in *Ramirez*, 142 S. Ct. 1718, announced limitations on federal fact development but left *Martinez*'s core holding undisturbed.

1. *Martinez*, *Maples*, and *Ramirez*

The doctrine of procedural default imposes a bar on federal review of claims that "a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez*, 566 U.S. at 9. A state prisoner may overcome default by showing "cause" for the default and "prejudice" from the violation of federal law. *Id.* at 10 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Postconviction counsel's ineffective assistance can constitute "cause." In *Martinez*, the Court held that when an initial review collateral proceeding is the first time a petitioner can raise an IATC claim, state habeas counsel's ineffective assistance at that stage could supply "cause" for the default of the IATC claim. 566 U.S. at 17. The next Term, the Court clarified that *Martinez* applied to Texas, because the state procedural

framework made it "highly unlikely" a typical defendant would have a meaningful opportunity to raise IATC on direct appeal. *Trevino v. Thaler*, 569 U.S. 413, 429 (2013).

This Court has held that *Martinez* requires a petitioner to show that (1) state habeas counsel's performance at an initial collateral review proceeding was deficient as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) an IATC claim that state habeas counsel failed to raise has "some merit." *Canales v. Stephens*, 765 F.3d 551, 567-68 (5th Cir. 2014). In addition, a habeas petitioner must demonstrate prejudice, which "requires a showing that there is 'a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 568 (quoting *Strickland,* 466 U.S. at 694) (alteration in original).

The Supreme Court has separately held, in *Maples*, 565 U.S. at 281, that an attorney's abandonment in postconviction proceedings can provide cause for the resulting default. *Maples* reasoned that counsel's actions could not be imputed to the client because the principal-agent relationship had been "severed." *Id.* (citing *Jamison v. Lockhart,* 975 F.2d 1377, 1380 (8th Cir. 1992) (attorney conduct may provide cause for procedural default where, as a result of a conflict of interest, the attorney "ceased to be [petitioner's] agent")). Mr. Tabler shows below that his state habeas counsel abandoned their client during and after the 2008 waiver hearing and

severed the principal-agent relationship, establishing "cause" under *Maples* in addition to *Martinez*.

Ramirez leaves these principles undisturbed while holding that, under certain circumstances, 28 U.S.C.§ 2254(e)(2) limits the evidence federal habeas courts can consider in applying them to evidence found in the state court record. 28 U.S.C. § 2254(e)(2) provides that, with certain exceptions, a federal habeas court shall not hold an evidentiary hearing on a claim "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings[.]" In *Ramirez*, the Court held that *Martinez* did not create an exception to § 2254(e)(2)'s restriction on federal-court evidentiary development because, under agency principles, counsel's negligent performance must be attributed to the client:

> Under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner. . . . because there is no constitutional right to counsel in state postconviction proceedings, a prisoner ordinarily must "bea[r] responsibility" for all attorney errors during those proceedings. Among those errors, a state prisoner is responsible for counsel's negligent failure to develop the state postconviction record.
>
> * * *
>
> In sum, under § 2254(e)(2), a prisoner is "at fault" even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements.

Ramirez, 142 S. Ct. at 1734, 1736.

While the majority opinion in *Ramirez* left *Martinez* undisturbed and said nothing about *Maples*, a broad reading of the opinion—one that applied it to foreclose federal fact development even to show state postconviction counsel's abandonment or ineffectiveness—would deprive those earlier decisions of any real force. A broad reading, however, would conflict with the language of both the opinion and the statute and unconstitutionally suspend the writ of habeas corpus.

2. A Habeas Petitioner Whose State Postconviction Counsel is Guilty of Abandonment or Extraordinarily Deficient Performance Has Not "Failed to Develop" the Claim in State Court and May Receive Federal Fact Development.

The *Ramirez* majority rested its decision primarily on agency principles: attorney actions furthering the litigation, including attorney errors, bind a client because the attorney acts as the client's agent and the client bears the risk of attorney error. *Ramirez*, 142 S. Ct. at 1733 (quoting *Coleman*, 501 U.S. at 753). Hornbook law provides, however, that an attorney who abandons the client no longer acts as the client's agent. *See Maples*, 565 U.S. at 281 ("Withdrawal, whether proper or improper, terminates the lawyer's authority to act for the client.") (quoting 1 Restatement (Third) of Law Governing Lawyers § 31, Comment *f* (1998)).

It follows that a client abandoned by state postconviction counsel bears no fault for counsel's errors and has not "failed to develop" the evidence underlying an IATC claim. Accordingly, § 2254(e)(2) imposes no obstacle to federal evidentiary development of either state postconviction counsel's abandonment or of trial

counsel's ineffective assistance for a petitioner who can establish abandonment. *See Williams v. Taylor*, 529 U.S. 420, 437 (2000) (where prisoner did not "fail[] to develop' the facts under §2254(e)(2)'s opening clause, . . . he will be excused from showing compliance with the balance of the subsection's requirements").

An attorney's extraordinarily deficient conduct may also sever the agency relationship. *Ramirez* equated attorney "negligence" with "ineffective assistance" in describing the type of attorney-agent error for which the client bears the risk. *See* 142 S. Ct. at 1727 ("The question presented is whether the equitable rule announced in *Martinez* permits a federal court to dispense with § 2254(e)(2)'s narrow limits because a prisoner's state postconviction counsel *negligently failed to develop* the state court record."); 1734 ("Respondents' primary claim is that a prisoner is not "at fault," and therefore has not "failed to develop the factual basis of a claim in State court proceedings," § 2254(e)(2), if state postconviction counsel *negligently failed to develop* the state record for a claim of ineffective assistance of trial counsel. But under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner.") (citations omitted); 1735 ("a state prisoner is responsible for counsel's *negligent failure* to develop the state postconviction record"), 1735 ("a prisoner is 'at fault' even when state postconviction counsel is *negligent*"), 1735 ("Among those errors, a state prisoner is responsible for counsel's *negligent failure to develop* the state

postconviction record."); 1738 (habeas court "may not consider that evidence on the merits of a *negligent prisoner's* defaulted claim") (all emphases added).

In some cases, as in Mr. Tabler's, counsel's inaction or conduct leading to the default far exceeds ordinary negligence and rises to an extraordinary level. *Cf. Holland v. Florida*, 560 U.S. 631, 651-52 (2010) (recognizing that attorney misconduct exceeding mere negligence can constitute "extraordinary" circumstance warranting equitable tolling of federal statute of limitations). While a client may bear the risk of negligent attorney error, a client should not bear the risk of an extreme departure from the minimum standards of professional conduct. A petitioner whose state post-conviction counsel has defaulted a claim in state court through extraordinarily deficient performance, therefore, does not "fail to develop" the claim within the meaning of § 2254(e)(2). Such a petitioner may receive federal factual development of both state post-conviction counsel's deficiency and trial counsel's ineffective assistance.

Moreover, evidence regarding state habeas counsel's abandonment and ineffectiveness does not bear on the underlying constitutional claim of trial counsel's ineffectiveness, and consequently § 2254(e)(2) does not apply to this evidence at all. *See Ramirez*, 142 S. Ct. at 1738 (declining to address argument that § 2254(e)(2) bars an evidentiary hearing only on a "claim"). Finally, § 2254(e)(2) has no application to a petitioner like Richard Tabler, who (as described below) cooperated

with his investigation and the development of his record in his lucid intervals and cannot be held responsible for his illness-driven efforts to waive, which were abetted by his counsel's abandonment and deficient performance. In circumstances like these, the incompetent petitioner does not "fail to develop" the state court record and § 2254(e)(2) does not apply.

3. *Ramirez* Would Foreclose Federal Habeas Review of a Constitutional Claim Categorically and Effect an Unconstitutional Suspension of the Writ.

Article I, § 9, cl. 2, of the Constitution, the Suspension Clause, provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." Because *Ramirez* would foreclose evidentiary development and thus habeas review of all IATC claims based on evidence dehors the state court record, it would unconstitutionally suspend the writ for that entire category of constitutional claims. This Court need not address that broad argument, however. At a minimum, applying *Ramirez* to foreclose federal fact development to show state postconviction counsel's abandonment would suspend the writ for the small class of cases in which abandonment occurs.

The Supreme Court's precedents provide governing principles for detecting a suspension of the writ. First, judgments about its proper scope are 'normally for Congress to make.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas,* 517 U.S. 314, 323 (1996)). In *Felker*, for example, the Court upheld new

limitations on successive petitions in the then-recent AEDPA.[10] It noted that the provision requiring Court of Appeals authorization for a successive petition merely transferred a screening function ordinarily exercised by the district court, and that other provisions merely codified pre-existing limitations on relief for successive petitioners. The new restrictions constituted "a modified res judicata rule," and as such did not amount to a suspension of the writ. *Id.* at 664.

Second, the Court has repeatedly rejected statutory interpretations that create suspension problems in favor of interpretations that preserve constitutionally adequate forms of habeas review. For example, in *I.N.S. v. St. Cyr*, 533 U.S. 289, 298–301 (2001), St. Cyr filed a habeas petition challenging a statutory interpretation that made him ineligible for discretionary relief from deportation. The Immigration and Naturalization Service ("INS") argued that certain statutory amendments had stripped the federal courts of habeas jurisdiction to decide that question of law. *Id.* at 298. The Supreme Court reasoned that the INS analysis, if adopted, would "preclude the review of a pure question of law by any court," and "provide no adequate substitute" for habeas review, giving rise to "substantial constitutional questions." *Id.* at 300, 305. Because the INS interpretation would present a "serious Suspension Clause issue," the Supreme Court rejected it. *Id.* at 305.

[10] Antiterrorism and Effective Death Penalty Act of 1996.

Similarly, in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–46 (1998), the district court rejected a *Ford*[11] claim of incompetence for execution in the initial habeas petition as unripe. On the eve of execution, Martinez-Villareal renewed his claim of incompetence. This time, the State, invoking *Felker*, argued that the claim constituted an unauthorized successive petition. *See id.* at 645. In response, Martinez-Villareal, citing the Court of Appeals decision, warned that the State's construction could violate the Suspension Clause. *See* Brief for Respondent, *Stewart v. Martinez-Villareal*, No. 97-300, 1998 WL 47596, at 34 (Jan. 9, 1998) (citing *Martinez-Villareal v. Stewart, et al.,* 118 F.3d 628 (9th Cir.1997)). The Supreme Court agreed that *Felker* did not control:

> Petitioners place great reliance on our decision in *Felker v. Turpin,* 518 U.S. 651 (1996), but we think that reliance is misplaced. In *Felker* we stated that the "new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what used to be called in habeas corpus practice 'abuse of the writ.'" *Id.,* at 664. It is certain that respondent's *Ford* claim would not be barred under any form of res judicata. Respondent brought his claim in a timely fashion, and it has not been ripe for resolution until now.
>
> Thus, respondent's *Ford* claim was not a "second or successive" petition under § 2244(b) and we have jurisdiction to review the judgment of the Court of Appeals on petitioners' petition for certiorari.

Martinez-Villareal, 523 U.S. at 645-46 (parallel citations omitted).

[11] *Ford v. Wainwright*, 477 U.S. 399 (1986).

Third, while Congress has substantial authority to regulate the scope of habeas review and provide substitute mechanisms for certain types of cases, the Court has made clear that the procedure Congress provides, by whatever name, must provide a petitioner with a fair opportunity to challenge the legality of detention. *United States v. Hayman*, 342 U.S. 205 (1952), and *Swain v. Pressley*, 430 U.S. 372 (1977), illustrate this point. *Hayman* upheld the then newly enacted collateral review mechanism for federal prisoners, 28 U.S.C. § 2255, because Congress intended the remedy "to be as broad as habeas corpus" and the statute explicitly left the habeas remedy open where § 2255 was "inadequate or ineffective to test the legality of [the petitioner's] detention." 342 U.S. at 205, 209, 217. The Court held, moreover, that § 2255 itself provided a remedy for the district court's procedurally unfair disposition of Hayman's IATC claim. For those reasons, the Court concluded that it need not "reach constitutional questions" about the adequacy of § 2255 as a substitute for habeas review. *Id.* at 224.

Similarly, in *Swain*, the Court upheld D.C. Code § 23-110, a substitute for habeas review for District of Columbia prisoners. Citing *Hayman*, the Court held that the § 23-110 savings clause, which was identical to the one in § 2255, along with the statute's inclusion of procedures generally equivalent to habeas review, rendered it constitutional.

> [T]he only constitutional question presented is whether the substitution of a new collateral remedy which is both adequate and effective should be regarded as a suspension of the Great Writ within the meaning of the Constitution. . . . The Court implicitly held in *Hayman*, as we hold in this case, that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.

430 U.S. at 381.

The Court applied these principles in *Boumediene v. Bush*, 553 U.S. 723 (2008), to review procedures under the Detainees Treatment Act ("DTA) and Military Commissions Act ("MCA") that provided extremely limited substitutes for federal habeas review to Guantanamo Bay detainees. The Court distinguished *Hayman* and *Swain* because the statutes in those cases did not eliminate traditional habeas review. Rather, they "granted to the courts broad remedial powers," and included savings clauses. *Id.* at 776. The Court observed that "Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting." *Id.* at 786. In sum:

> [W]hen the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.

Id. at 787. Because the Government had not established that the DTA and MCA met these criteria or functioned as adequate substitutes for habeas corpus, the statutes effected an unconstitutional suspension of the writ. *Id.* at 792.

Ramirez would also suspend the writ for a class of cases. As in *St. Cyr*, precluding federal fact development to establish an excuse for state postconviction counsel's default would make federal habeas review effectively unavailable for a category of claims. It would place a question of law, the ineffective assistance of trial counsel in violation of the Sixth Amendment, beyond the reach of habeas review.

In contrast to *Felker*, *Ramirez* does not impose a "modified res judicata" rule. It would prevent petitioners from ever receiving even one merits review of their IATC claims. In contrast to *Hayman* and *Swain*, *Ramirez* would impose a process both inadequate and ineffective to allow prisoners to test the legality of their detention. Indeed, its limitation on review would exceed the process found constitutionally inadequate in *Boumediene*, where at least each petitioner received some review. Under *Ramirez,* the majority of petitioners who brought ineffective assistance claims would receive no merits review at all.

This Court, however, need not reach the broad question whether *Ramirez* suspends the writ across the board. Whether or not Congress could properly limit the availability of habeas review in cases of mere attorney negligence under § (e)(2), it would certainly exceed Congress's authority to foreclose federal review for petitioners abandoned by their counsel in state court. Those petitioners are not bound by their attorneys' actions and have not "failed" to develop the state court record.

Applying *Ramirez* to foreclose federal habeas review of their substantial IATC claims would suspend the writ for them,

Because imposing the logic of *Ramirez* in cases of abandonment would unconstitutionally suspend the writ of habeas corpus in those cases, this Court should not adopt that logic.

4. *Ramirez* Would Deprive Litigants Abandoned by Their Counsel of Due Process.

Ramirez would also deprive habeas litigants who claim the ineffective assistance of both state postconviction counsel and trial counsel of the opportunity to prove their claims. At least for petitioners whose counsel have abandoned them, foreclosing federal fact development would violate the Due Process Clause. A petitioner could proffer extensive evidence and make detailed factual allegations demonstrating that state habeas counsel ineffectively failed to prepare and present a substantial IATC claim. The allegations might establish both state habeas counsel's and trial counsel's deficient performance and the resulting prejudice. Nevertheless, even if state habeas counsel abandoned the client, *Ramirez* would require the federal habeas court to reject the claim without a hearing.

The Due Process Clause forbids such a result; a court may not summarily dismiss a well-pleaded federal claim. *See, e.g., Herman v. Claudy*, 350 U.S. 116, 119 (1956); *Palmer v. Ashe*, 342 U.S. 134 (1951); *Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004) (holding COAs challenging a court's summary dismissal will

issue "if the district court pleadings, the record, and the COA application demonstrate that reasonable jurists could debate whether the petitioner has made a valid claim of a constitutional deprivation"); *DeRoo v. U.S.*, 223 F.3d 919, 924 (8th Cir. 2000) (holding district court's summary dismissal of § 2255 motion to vacate conviction and plea agreement was error because "the motion at least facially claims that [defendant's] decision to enter into the plea agreement and waive his appeal rights was not knowing and voluntary as a result of ineffective assistance of counsel"). It may not reject the claim on the basis of the respondent's answer denying the allegations or on the basis of "speculation or surmise." *Palmer*, 342 U.S. at 137; *see also Herman,* 350 U.S. at 119; *see also U.S. v. Nkuku*, 602 F. App'x 183, 186 (5th Cir. 2015) (vacating and remanding trial court's summary dismissal because appellate courts "cannot surmise whether the petitioner is entitled to relief . . . when district courts have not articulated their rationales for summarily dismissing § 2255 motions"). A dispute over material facts "should be decided only after a hearing." *Herman*, 350 U.S. at 121; *see also McNeal v. Culver*, 365 U.S. 109, 117 (1961); *U.S. v. Witherspoon*, 231 F.3d 923, 926–27 (4th Cir. 2000) (vacating summary dismissal where "the record does not conclusively demonstrate that [petitioner] was entitled to *no* relief" because "the facts *if true* would entitle petitioner to relief" (emphasis added)). Furthermore, due process guarantees a defendant fair notice and opportunity to be heard in a wide variety of contexts. *See Panetti v. Quarterman*,

551 U.S. 930, 949 (2007) (citing *Ford v. Wainwright*, 477 U.S. 399, 424-27 (1986) (Powell, J., concurring)); *Lankford v. Idaho*, 500 U.S. 110 (1991); *In re Oliver*, 333 U.S. 257 (1948); *McDonald v. Wise*, 769 F.3d 1202, 1213–14 (10th Cir. 2014) (holding due process guaranteed defamed former mayoral appointee to a public name-clearing hearing provided by the City as "the entity responsible for the stigmatization").

This Court need not decide whether applying *Ramirez*'s constraints would violate the due process rights of petitioners whose state habeas counsel were merely ineffective. Applying those constraints in cases of abandonment, which fall outside *Ramirez*'s proper scope, would deprive those petitioners of a fair hearing without any legitimate reason. Richard Tabler has pled and can prove detailed allegations establishing that both his state habeas counsel and his trial counsel rendered him ineffective assistance and that his state habeas counsel abandoned him. He has a due process right, despite *Ramirez*, to a hearing on his claim.

B. Standards for Waiver of State Habeas Proceedings

Article 11.071 of the Texas Code of Criminal Procedure does not explicitly give an applicant the ability to waive his right to file a state habeas application. Tex. Code Crim. Proc. Ann. art. 11.071. The CCA has interpreted the statute as permitting waivers, however, where the court rules that an applicant is competent and "knowingly," "intelligently," and "voluntarily" chose to waive the filing of a habeas

application. *Ex parte Reynoso* (*Reynoso II*), 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008) ("knowingly and voluntarily"), *overruling, in part, Ex parte Reynoso* (*Reynoso I*), 228 S.W.3d 163 (Tex. Crim. App. 2007); *Ex parte Reedy*, 282 S.W.3d 492 (Tex. Crim. App. 2009) (requiring that applicant "knowingly, intelligently, and voluntarily" waive non-capital habeas proceedings); *Ex parte Martinez*, No. WR-61,844-01, 2005 WL 914216 (Tex. Crim. App. 2005) (dismissing writ under Article 11.071 based on competency determination); *Ex parte Hall*, No. WR-70,834-01, 2009 WL 1617087 (Tex. Crim. App. 2009) (same).

These two inquiries—competence, on the one hand, and knowing, intelligent, and voluntary waiver, on the other—reflect standards applied in federal cases under analogous circumstances. *See Godinez v. Moran*, 509 U.S. 389, 400 (1993) ("In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary."). Courts ask whether a petitioner seeking to waive federal habeas review has the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S. 312, 314 (1966). The Fifth Circuit has distilled this rule into a three-part test. *See Rumbaugh v. Procunier*, 753 F.2d 395, 396 (5th Cir. 1985); *Mata v. Johnson*, 210 F.3d 324, 328

(5th Cir. 2000). "This test requires the answer to three questions": whether the petitioner suffers from a mental disease or defect, whether any such disease or defect prevents the petitioner from understanding his or her legal position and options, and even if not, whether any such disease or defect prevents him or her from making a rational choice among the options. *Rumbaugh*, 753 F.2d at 398. The "rational choice" inquiry incorporates the rule that a valid waiver must be made voluntarily. *See Mata*, 210 F.3d at 329 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brady v. United States*, 397 U.S. 742, 748 (1970)). As the Eighth Circuit concluded in applying the same *Rees* test, "Logic employed in the service of irrational premises does not produce a rational decision. . . . [I]t is not sufficient simply to determine whether a waiver decision has been arrived at logically." *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987).

Although a valid waiver requires satisfaction of all three requirements, a waiver is still not valid under Texas law until "the filing date applicable to the applicant." Tex. Code Crim. Proc. Ann. art. 11.071 § 4(e). As the CCA has noted, "Because an applicant can waffle in his decision until the day the application is due, a 'waiver' is not truly effective until after that date has passed." *Reynoso II*, 257 S.W.3d at 720 n.2.

C. State Habeas Counsel's Deficient Advocacy and Abandonment During the Waiver Hearing Prevented Mr. Tabler From Making a Valid Waiver.

Texas law required Mr. Tabler's state habeas counsel, like all appointed counsel, to continue acting as his advocates unless and until the court relieved them of their duties, which included the obligation to prepare for the waiver hearing and advocate for his interests at the hearing. Yet counsel attended the hearing as spectators rather than participants and washed their hands of Mr. Tabler, who was still their client, after that.

As explained above, because an attorney's abandonment severs the agency relationship between attorney and client, Mr. Tabler did not "fail to develop" his prospective trial IATC claims by his uncounseled waiver. *Maples*, 565 U.S. at 922-24, 28 U.S.C. § 2254(e)(2). Thus, while counsel's abandonment plainly appears on the state court record in the transcript of the waiver hearing, the district court retained the discretion to order an evidentiary hearing to develop the further extra-record evidence of abandonment and ineffective assistance that Mr. Tabler proffered. That proffer showed that, given what counsel knew about the instability of Mr. Tabler's decisions and his severe mental health impairments, they had a professional obligation to challenge his desire to waive. *See Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990). In particular, counsel received an eighteen-page neuropsychologist's report that they never disclosed to the court. It would have demonstrated Mr.

Tabler's inability to make a competent and knowing, intelligent, and voluntary waiver.

Had counsel properly provided information to the court and challenged their client's ability to make a valid waiver, Mr. Tabler would not have been permitted to waive. Mr. Tabler's counsel could then have filed a habeas application raising the substantial IATC claims alleged in his amended federal habeas petition and those claims would have had a reasonable probability of success on the merits. For the reasons explained below, counsel's abandonment and deficient advocacy excuses the default.

1. State Habeas Counsel Had a Continuing Duty to Advocate For Their Client Until Relieved, and Given What They Knew or Should Have Known, Had an Obligation to Contest Their Client's Waiver.

Texas law provides that an attorney appointed under Tex. Code Crim. Proc. art. 26.04 shall "represent the defendant until . . . appeals are exhausted, or the attorney is permitted or ordered by the court to withdraw as counsel[.]" *See Ward v. State*, 740 S.W.2d 794, 796-98 (Tex. Crim. App. 1987) ("An attorney's legal responsibilities do not magically and automatically terminate at the conclusion of the trial"; counsel remains counsel for all purposes until expressly permitted to withdraw). Texas law also provides that "A defendant is entitled to representation by counsel before any court-ordered competency evaluation and during any proceeding at which it is suggested that the defendant may be incompetent to stand

trial." Tex. Code Crim. Proc. Ann. art. 26B.006; *see Davis v. State*, 484 S.W.3d 579, 586 (Tex. App. 2016) (court erred by failing to appoint counsel before competency evaluation); *see also, e.g.*, *Raymond v. Weber*, 552 F.3d 680, 684 (8th Cir. 2009) (agreeing with all other circuits to consider the question that competency hearing is critical stage of criminal prosecution); *Appel v. Horn*, 250 F.3d 203, 215 (3d Cir. 2001).

Furthermore, under the rules of professional conduct, "When [a] lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action." Tex. Disciplinary R. Prof'l Conduct 1.16(b). When a client's condition requires it, an attorney may seek the appointment of a guardian to protect the client's interests. *See In re McCann*, 422 S.W.3d 701, 708 (Tex. Crim. App. 2013) ("[A] client's ability to define his or her own best interests may end when an attorney's duty under [former] Rule 1.02(g) . . . begins—when an attorney reasonably believes that the client's ability to make decisions in his or her best interest is compromised, the appointment of a guardian should be sought."); *see also Comer v. Stewart*, 230 F. Supp. 2d 1016, 1019 (D. Ariz. 2002) (instructing habeas counsel to continue investigating, and appointing new counsel to represent petitioner "concerning his expressed decisions to end his appeals and proceed to execution"); *O'Rourke v.*

Endell, 153 F.3d 560, 569 (8th Cir. 1998) ("We believe [petitioner] should have been represented by an attorney, either a counsel of record or a 'next friend,' to argue that he lacked the capacity to waive his appeal.").

Together, these principles compel the conclusion that "[i]t is a dereliction of habeas corpus counsel's duty to simply acquiesce to a capital client's insistence that he or she wishes to be executed." Tex. Bar Ass'n, *Guidelines and Standards for Texas Capital Counsel* 12.2(B)(2)(c) (2006). Counsel has a duty to act in a client's best interest if counsel suspects the client cannot make a competent and voluntary waiver. For example, in *Bouchillon*, 907 F.2d 589, this Court held that counsel was ineffective for failing to challenge his client's mental status. Although aware of his client's history of mental problems and institutionalizations, counsel nonetheless undertook no investigation "because he said that Bouchillon appeared rational." *Id.* at 596. Central to the court's reasoning was the fact that "the trial court . . . relies on counsel to bring these matters to his or her attention. . . . If counsel fails here to alert the court to the defendant's mental status the fault is unlikely to be made up." *Id.*; *see United States v. Avila-Gonzalez*, 757 F. App'x 353, 356-57 (5th Cir. 2018) (granting evidentiary hearing on claim that trial counsel was deficient for ignoring client's indications that he had attempted suicide, suffered from paranoia and schizophrenia, and had spent time in mental hospital, without investigating whether he was competent).

This echoes the position of other circuits. "[W]e think it axiomatic that the desire of a defendant whose mental faculties are in doubt to be found competent does not absolve counsel of his or her professional responsibility to put the government to its proof at a competency hearing when the case for competency is in serious question." *Hull v. Freeman*, 932 F.2d 159, 169 (3d Cir. 1991), *overruled on other grounds as stated in Caswell v. Ryan*, 953 F.2d 853, 859 (3d Cir. 1992); *see also Williamson v. Ward*, 110 F.3d 1508, 1518-19 (10th Cir. 1997) (attorney who knew client had a history of mental problems and was being medicated, observed his bizarre behavior, and knew he had previously been found incompetent and received disability benefits had duty to investigate competency and seek a hearing); *United States v. Boigegrain*, 155 F.3d 1181, 1188 (10th Cir. 1998) ("[D]efendant's lawyer is not only allowed to raise the competency issue, but . . . she has a professional duty to do so when appropriate."); *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994) ("[C]ounsel has a duty to investigate a client's competency to stand trial or plead guilty. An attorney cannot blindly follow a client's demand that his competency not be challenged."). An attorney who abandons the role of advocate for a client's interests is no counsel at all. *See Appel*, 250 F.3d at 215 ("[The attorneys] had the obligation to act as counsel at Appel's competency hearing by subjecting the state's evidence of competency to meaningful adversarial testing.").

This also comports with the due process standards this Court has imposed on hearings for competency to waive federal habeas proceedings. In *Mata v. Johnson*, 210 F.3d 324 (5th Cir. 2000), the Court held that an "opportunity for the parties to present testimony or documentary evidence" was a requisite part of an adequate competency process. *Id.* at 333. This presupposed the existence of two adversarial "*parties*"—one advocating for competency to waive, the other challenging it. When one party, in effect, does not show up, the hearing fails to ensure a reliable result. *See O'Rourke*, 153 F.3d at 569 (finding waiver proceeding violated due process where no counsel argued against client's competence or voluntariness).

Mr. Tabler's counsel had an obligation to represent him at his waiver hearing but instead left him on his own to deal directly with the court.

2. Counsel Refused to Take the Role of Advocates During the Waiver Hearing.

At the September 30, 2008, waiver hearing, Mr. Schulman announced that, while present, "we do not announce ready[] because we do not intend to take a position one way or the other of what should happen today." V.CR.357, ROA.3096. In the ensuing colloquy, Mr. Tabler's best interests went unguarded while counsel and the court allowed him to declare himself "competent enough." V.CR.365, ROA.3104.

Counsel made no objection when the court incorrectly advised Mr. Tabler that his time for deciding whether to file a state habeas petition would not expire unless

and until the CCA decided his direct appeal. ROA.3098-3100, 3106. Counsel declined to offer neuropsychologist Dr. Harrison's two-page competency letter as a defense exhibit and asked the court to mark it as a court's exhibit. ROA.3104-05; ROA.1311. Counsel did not subject the letter to adversarial testing.[12] To the extent the letter identified a consulting question at all, it misidentified the proceedings: "whether the defendant is competent to make decisions concerning suspending his rights to *automatic appeal* of his capital murder conviction and resulting execution." ROA.1312. In other words, the letter did not even discuss Mr. Tabler's competence to make the more substantial decisions required in the litigation of a state habeas petition, such as consultation with counsel about evidence development and presentation. While the letter identified a series of neuropsychological tests performed, it did not report any of the results or explain their significance.[13] The letter focused only on Mr. Tabler's cognitive appreciation of his legal position,

[12] The two-page letter, dated July 28, 2008, was not included in the state-court record Respondent compiled from the CCA's records. Nor is it located in the Bell County state court file Petitioner received. On appeal, for purposes of the state court record, Mr. Tabler submitted a copy of the letter as RE 10 and moved to supplement the record with this document. The letter does not reflect that Dr. Harrison had access to any records regarding Mr. Tabler's history of psychiatric illness and hospitalizations. Moreover, Dr. Harrison noted that during his examination of Mr. Tabler on June 27, 2008, Mr. Tabler "expressed a desire to continue the appeal process . . . ." ROA.1312

[13] As discussed in the *Application to Expand COA*, Point II.C.2, the tests demonstrated impaired brain function in a number of key domains.

without asking if he suffered from any mental diseases or defects or, if so, whether they prevented him from choosing rationally among his options.

Even so, the two-page letter contained numerous statements providing grounds to question the validity of Mr. Tabler's waiver. Dr. Harrison acknowledged that Mr. Tabler's "knowledge understandably weakens when it comes to all the legal possibilities which could result in a possible suspension of the death sentence." He commented that "[i]t is not at all unusual to have death row inmates vacillate on such matters affecting their ultimate best interests, particularly in proportion to their perceived circumstances and fluctuating mental status while incarcerated." And the letter concluded by noting that, at the time of Dr. Harrison's June 27 interview, Mr. Tabler "expressed a desire to continue the appeal process." Finally, in contrast to Dr. Harrison's eighteen-page report, the two-page report did not satisfy *Rumbaugh*'s three-part test. It addressed only the second factor, whether any disease or defect prevented Mr. Tabler from *understanding* his legal position and options, a cognitive criterion, without addressing the first factor (existence of a mental disease or defect) or the third (whether it prevented rational choice among options). Competent counsel acting in the client's interests could have attacked each of these shortcomings using information from the longer report.

Finally, while counsel announced at the end of the hearing that they would "stay on as [Mr. Tabler's] representatives to whatever extent he wants so long as

he's in the system," they sought and obtained the court's assurance that it "release[d]" them from "further actions in this case . . . with regard to mitigation, et cetera." The court agreed that "we won't go forward" with "mitigation experts and such as that," but directed counsel to be "available for standby[.]" ROA.3107-08.

As Mr. Tabler's advocates, counsel had three choices consistent with their duty as appointed counsel. They could have moved to be relieved before the hearing, advocated for their client's wishes at the hearing, or, acting in his best interest, argued that he could not make a competent or knowing, intelligent, and voluntary waiver. They could not, however, appear as his counsel and decline to play an advocate's role. Counsel were in effect absent at the hearing, abandoning their client and rendering the result unreliable. *See Bouchillon*, 907 F.2d at 596; *Appel*, 250 F.3d at 215. At a minimum, counsel's conduct was extraordinarily deficient.

The abandonment or extraordinary deficiency that excuses the default of Mr. Tabler's state habeas IATC claims therefore appears on the face of the state court competency hearing transcript. Section 2254(e)(2) imposes no obstacle to federal fact development of the IATC claims because the abandonment appears in the state court record and, in any case, a client abandoned by counsel, or represented by extraordinarily deficient counsel, is not "at fault" for failing to develop evidence supporting claims. Furthermore, as discussed above, the evidence of state habeas counsel's ineffectiveness does not relate to the IATC "claim" and therefore falls

outside the reach of § (e)(2). With § (e)(2) satisfied or inapplicable, this Court may consider extra-record evidence of abandonment and ineffectiveness concerning Mr. Tabler's ability to waive, in order to decide whether state habeas counsel's overall conduct excused the default of the state habeas claims under *Maples* and *Martinez*. As explained below, the extra-record evidence Mr. Tabler proffered in the district court demonstrates the full extent of counsel's abandonment and ineffectiveness.

3. State Habeas Counsel Knew About Their Client's Pronounced Mental Illnesses, Delusions and/or Real Complaints of Persecution, and History of Vacillating on Waiver Before the Waiver Hearing.

a. Mental illness

State habeas counsel knew or should have known about Mr. Tabler's serious mental illness, which prevented him from making a rational choice about his decision to waive his state habeas proceedings. First, counsel obtained the file of original trial counsel Russ Hunt, which contained many indications of serious mental illness that could impair Mr. Tabler's ability to make a rational decision to waive. For example, the file documented a history of blackouts, traumatic brain injury, and mental illness. *See, e.g.*, ROA.1109-10. In addition, Mr. Tabler himself told Mr. Shulman about his history of mental illness: he explained that, while in county jail before trial, he attempted to take his own life, he was hospitalized at Scott & White Hospital, and the state wanted to send him to a mental hospital. ROA.1212. Alma Lagarda of the Texas Defender Service wrote a report to Mr. Schulman on December

18, 2007. She described Mr. Tabler's "history of self-mutilation and suicidal tendencies" and details of medical treatment he received, including diagnoses of ADHD and bipolar disorder, along with a description of head trauma suffered in late adolescence. ROA.1241-42.

Moreover, state habeas counsel's own statements reveal their awareness of their client's mental health problems. Mr. Schulman described Mr. Tabler in correspondence to appellate counsel and team members as "way delusional," having "a very depressed side," "fairly bizarre," "fairly delusional," and "increasingly paranoid." He indicated that his client had "always been delusional to some degree." ROA.1228, ROA.1288, ROA.1290-91, ROA.1935.

Most important, Mr. Schulman had Dr. Kit Harrison's eighteen-page neuropsychological report. It showed Mr. Tabler's incapacity to waive intelligently and voluntarily:

> Although being oriented in all spheres, he demonstrates *a rapid-cycling mood destabilization* with strong evidence of Bipolar Disorder, Type I. He demonstrates full-blown manic and euphoric ideation which is evident during interview, coupled with obvious rapid-cycling depression, suicidality, intermittent explosiveness, and surging anger with a moment's notice. Thus, he is currently thought to be a danger to himself and others. . . . Although there is a clearly manipulative and attention-seeking element to Mr. Tabler's overt statements of homicidality, he does describe *compulsive desires to injure himself* and others. This is thought to be, in part, due to a *highly paranoid and delusional worldview of chronic duration*. He gets so expansive, euphoric, and grandiose with drugs, or without drug intoxication, that

> he *loses touch with reality*. It is noted he is currently off antipsychotic medication. . . . He is *mildly psychotic*.

ROA.1493. Dr. Harrison concluded that Mr. Tabler "demonstrates a deep and severe constellation of mental illnesses" that "have been disabling and debilitating for him since at least early adolescence." He cataloged Mr. Tabler's problems, including "mood instability, behavior in response to his rapid-cycling mood, cognition problems involving primarily organization and processing, learning problems, impulsiveness, and explosiveness." He indicated that some of his impairments were "associated with genetic and clinical syndromes likely present at birth or which arise during childhood," while others were "acquired." ROA.1503. He reached the following diagnostic impressions:

Axis I	Bipolar Disorder, Type 1, Most Recent Episode Mixed, Severe, With Psychotic Features R/O Intermittent Explosive Disorder Attention-Deficit Hyperactivity Disorder, Combined Type By History Polysubstance Dependence, (In Controlled Environment) Cognitive Disorder Not Otherwise Specified, (Post-Concussional) Adjustment Disorder with Anxiety
Axis II	Borderline Personality Disorder Antisocial Personality Disorder Schizoid Features
Axis III	Self-Mutilation, Serial Traumatic Brain Injuries, Tremor, Peripheral Neuropathy—Self-inflicted Wounds
Axis IV	Psychosocial Stressors: Death Row, History of Domestic Violence, Antisocial Conduct, Suicidal and Homicidal Conduct, Problems with Primary Support, Economic Hardship

Axis V Current GAF 15
Past year 15

ROA.1502-03.

Despite his awareness of all this evidence that Mr. Tabler had substantial mental health problems, Mr. Schulman never sent the court a copy of Dr. Harrison's eighteen-page report or even mentioned its existence at the September 30 waiver hearing. Mr. Schulman provided only Dr. Harrison's two-page competency report and asked to have it marked as a court's exhibit. ROA.3105. The eighteen-page report, however, would have established the first *Rumbaugh* factor, that Mr. Tabler suffered from multiple diseases or defects, and the third, that the defects prevented him from choosing rationally among his options. *Rumbaugh*, 753 F.2d at 398. Because the presence of the first and third factors satisfied *Rumbaugh* even without the second (cognitive understanding), the eighteen-page report would have given counsel the tools to establish Mr. Tabler's inability to make a valid waiver. Instead, counsel inexplicably withheld it from the state habeas court.

b. Threats real or imagined

Another important piece of information available to Mr. Tabler's state habeas lawyers was his apparently delusional persecutory beliefs. On December 25, 2007, for example, Mr. Tabler wrote that he was in "'FEAR' for my life!" because of threats "by Major Smith, Captain Laycox and Lt. Duff." ROA.1219. Mr. Tabler described denials of mail, meals, and privileges, and he concluded by stating that "I

feel that their [sic] doing this 'cause I refuse to help them as a snitch about some cell phones." ROA.1219. On April 25, 2008, Mr. Tabler mentioned these fears again. ROA.1289. Mr. Tabler also persistently complained about prison officials meddling with his mail. *See, e.g.*, ROA.1280 (mail not going to mother); ROA.1309-10 (not allowed phone calls to mother and sister; very slow to receive mail).

c. Vacillation on decision to waive

Relatedly, by the time of the hearing on September 30, 2008, state habeas counsel well knew that their client had frequently flipped his position on whether to waive. As described in more detail above, Mr. Tabler had decided to waive and quickly capitulated multiple times: on July 9, 2007, waive, on July 26, resume; on March 31, 2008, waive, on April 5, resume; on June 2, 2008, waive, on June 27, resume; on July 2, 2008, waive, on July 28, resume. Counsel told the court in an ex parte call on May 15, 2008, that Mr. Tabler had made a definitive decision to waive although he had only indicated at that point that he was "seriously not to[o] sure that I wanna go forward with my appeals after my direct appeal" and that he "*may* decide to drop my appeals[.]" ROA.1294 (emphasis added). Then state habeas counsel stood mute at the September 30 waiver hearing instead of informing the court of the wholly equivocal nature of their client's expressed wishes.

Mr. Schulman and Mr. Jasuta voiced no objection at the hearing to the continued lack of investigation funds, even though some of the avenues of

investigation their retained social worker suggested had direct bearing on Mr. Tabler's competence to waive his appeals and they could have sought the funding ex parte. They did not provide Dr. Harrison's eighteen-page report and certainly did not argue that the doctor's enforced reliance primarily on what Mr. Tabler himself had told him—because the funding stoppage had prevented the defense from developing an independent social history—had unduly narrowed the scope of his evaluation. Because they never disclosed the eighteen-page report, counsel could not ensure that the record reflected the substantial grounds it provided for finding Mr. Tabler's waiver invalid. Counsel did not voice their own frequently expressed concerns about Mr. Tabler's mental health and the instability of his decisions. Counsel failed to inform the court about the numerous delusional and/or genuine threats Mr. Tabler believed he had experienced. They presented no argument that the waiver was either premature (because no waiver could take effect until the due date) or invalid (because of incompetence or involuntariness).

4. Counsel's Deficient Performance Regarding Waiver Before the Hearing Culminated in Abandonment of an Advocacy Role During and After the Hearing

The district court granted COA only on counsel's "failure to challenge his competency." ROA.7506. Mr. Tabler seeks to expand the COA to embrace the entire course of deficient conduct, ripening into abandonment, that began months before the hearing and continued after the hearing. *See* contemporaneously filed

Application to Expand COA, Point I. A brief synopsis of those arguments appears below to provide the Court with context for the claim on which the district court did grant COA.

a. Counsel's pre-hearing performance was deficient

Counsel gave Mr. Tabler legally incorrect advice about his deadline to waive his state habeas rights, inaccurately told the judge that their client had definitively decided to waive at a point when Mr. Tabler had only said he was "not too sure" he wanted to continue, and performed no work on the case and never visited their client between the time they told the judge he wanted to waive and the date of the hearing. Their investigation was almost non-existent. Their performance was deficient even before the waiver hearing.

b. Counsel continued their abandonment or deficient advocacy after the hearing.

Although Texas law imposes an ongoing duty to investigate and develop a client's habeas claims even after he or she has expressed an intent to waive and a court has found him or her competent to waive, Tex. State. Ann. 11.071 § 3(a), state habeas counsel did nothing to develop the case between the waiver hearing and the waiver deadline that arrived 45 days later. Even though they knew Mr. Tabler's history of changing his mind, they never visited him, and their billing reflects no activity on his behalf during that time. Thus, counsel's abandonment of an advocate's role, not only during the waiver hearing but from that date until the

expiration of Mr. Tabler's time to file, was complete. At a minimum, their continued inaction constituted deficient performance.

For the reasons set forth in more detail in the *Application to Expand COA*, Point I, this Court should expand the grant of COA to embrace counsel's entire course of conduct respecting Mr. Tabler's fluctuating requests to give up his state habeas rights, beginning before the hearing and continuing until the deadline to waive.

5. Counsel's Abandonment and Deficient Performance Resulted in an Involuntary and Incompetent Waiver.

But for Mr. Schulman's and Mr. Jasuta's failure to challenge competency and voluntariness, there is a reasonable probability that the court would have found the *Rumbaugh* test satisfied and Mr. Tabler incapable of waiving. As Dr. Harrison's eighteen-page report laid out at length in September 2008, Mr. Tabler suffered from a "deep and severe constellation of mental illnesses [that] have been disabling and debilitating for him since at least early adolescence and have never been adequately managed from a medical or psychological standpoint." ROA.1503. These mental illnesses satisfy the first factor of the *Rumbaugh* test. Second, even if Mr. Tabler's mental diseases and defects did not clearly deprive him of his ability to understand his legal position (the second *Rumbaugh* factor), they did "prevent him from making a rational choice among his options," that is, from making a voluntary decision under the third *Rumbaugh* factor. *Rumbaugh*, 753 F.2d at 398; *Groseclose v. Dutton*, 594

F. Supp. 949, 958-62 (M.D. Tenn. 1984) (finding combination of mental illness and harsh conditions of confinement rendered waiver involuntary); *In re Cockrum*, 867 F. Supp. 484, 493 (E.D. Tex. 1994) (finding petitioner incapable of waiving under the *Rees* test where "the applicant's own letters to this court indicate a suicidal mentality that relates back to his relationship with his father, rather than to the crime for which he was sentenced to die" and therefore "must be rejected as a rational basis for waiver of legal review").

In sum, Mr. Tabler's choice to waive was driven by severe mental illnesses. It is reasonably probable that, if counsel had effectively advocated for Mr. Tabler's best interests instead of acquiescing in his incompetent and involuntary waiver, the court would not have allowed him to waive his state habeas proceedings. Therefore, state habeas counsel's abandonment, alone and in combination with the instances of ineffective assistance set forth above and below, excuse any default of state habeas review.

6. The District Court Misconstrued and Overlooked Mr. Tabler's Arguments on this Point.

The district court faulted Mr. Tabler for advancing "essentially . . . the same argument" that this Court rejected in his initial appeal — "that counsel abandoned their obligation to adequately investigate and challenge Petitioner's competency to waive, resulting in the procedural default of the numerous IATC claims contained in his amended petition." ROA.7440. The district court was wrong on two points.

First, as a factual matter, the post-remand claim, supported by evidence outside the record developed at the time of the state court waiver, was *not* "essentially . . . the same argument." More importantly, the district court failed to acknowledge that this Court vacated that aspect of its order, recognizing that the *Martinez* rule could excuse a default resulting from deficient advocacy that prevented the state habeas proceedings from taking place, and not just deficiency during the competency hearing. *Tabler v. Stephens*, 591 F. App'x 281, 281 (5th Cir. 2015); ROA.1019. This Court remanded to allow Mr. Tabler to show cause for the default of any IATC claims, and to show that those claims merit relief. The terms of the remand specifically allowed him to make "essentially the same argument" he made on his initial appeal, supplemented by evidence and argument establishing both an excuse for any default and substantial IATC claims.

The district court also rejected an abandonment argument Mr. Tabler did not make, while ignoring the evidence and argument he did present:

> [C]ounsel complied with their client's desire to waive further appeals on his behalf. As the Fifth Circuit noted, "[n]either the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions not to present evidence.

ROA.7440. This ruling relied on the end result of counsel's abdication of duty without addressing counsel's abdication itself. The amended habeas petition set forth, and Mr. Tabler has set forth above, the information counsel knew that

obligated them to contest their client's stated desire to waive. ROA.826-31. The district court did not address these reasons. Mr. Tabler has never argued for a blanket rule requiring an attorney to contest a client's waiver decision in every case.

The district court also insufficiently distinguished *Bouchillon* from Mr. Tabler's case:

> In *Bouchillon*, counsel was found ineffective for allowing his mentally ill client to plead guilty without having him evaluated or conducting an investigation "of any kind." *Id.* at 596. Unlike counsel in *Bouchillon*, however, Schulman and Jasuta were aware of Petitioner's mental health issues and hired Dr. Harrison to conduct a neuropsychological evaluation of their client after receiving some "bizarre" correspondence from him regarding his desire to waive his appeals. (ECF No. 90 at 117-119; ECF No. 90-3 at 72-76). Given that Dr. Harrison found Petitioner competent and that counsel agreed with this determination, counsels' decision not to contest Petitioner's decision to waive is imminently [sic] reasonable.

ROA.7440-41. The performance of Mr. Schulman and Mr. Jasuta, however, was if anything even worse than that of counsel in *Bouchillon*, who proceeded in ignorance of what an expert would say about his client. Schulman and Jasuta knew from Dr. Harrison's eighteen-page report that the doctor regarded their client as severely mentally ill and described symptoms that prevented him from making a voluntary waiver. In other words, they knew that the eighteen-page report could satisfy the first and third *Rumbaugh* factors and require the court to reject the waiver. Yet they never introduced the report or even advised the court of its existence. Dr. Harrison's two-page report, which they did provide (and which was in any event court-ordered),

focused narrowly and inappropriately only on the second *Rumbaugh* factor: whether Mr. Tabler had a cognitive impairment that prevented his understanding his legal situation. It was not reasonable but highly unreasonable, and an inexplicable act of abandonment or extraordinary deficiency, for counsel to withhold a report that satisfied the other *Rumbaugh* factors and default their advocacy duties respecting that report.

The district court also treated the trial court's competency finding as a finding of fact subject to the presumption of correctness set forth in 28 U.S.C. § 2254(e)(1). ROA.7442. As demonstrated above, however, the trial court made that finding on the basis of a radically incomplete record after a radically unfair hearing. Thanks to state habeas counsel's abandonment and extraordinarily inadequate advocacy, the court considered Dr. Harrison's two-page report, which addressed only one of the three *Rumbaugh* factors, and never heard about Dr. Harrison's eighteen-page report, which established the other two *Rumbaugh* factors, or about Mr. Tabler's long history of vacillation and delusional thoughts. These unconsidered factors, and state habeas counsel's abandonment and extraordinarily ineffective assistance, provide clear and convincing evidence to rebut the presumption of correctness.

Finally, the district court denied a stay and abeyance that would have allowed Mr. Tabler to exhaust state remedies on these arguments. The court rejected Mr. Tabler's motion because the state court had already denied him reinstatement of his

state habeas rights in 2009, and because Mr. Tabler's own conduct accounted for the waiver. ROA.2725-26. The court failed to consider Texas law's emphasis on giving petitioners "one full and fair opportunity" for state habeas review, the role of state habeas counsel's deficient conduct in their client's decision process, and the subsequent conflict of interest that prevented them from making an effective argument for reinstatement to the CCA. Unconflicted counsel could have advanced these arguments with strong reasons to expect success. *See Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002); *see also, e.g.*, *Ex parte Medina*, 361 S.W.3d 633, 637, 643 (Tex. Crim. App. 2011) (good cause where counsel "intentional[ly] refus[ed] to plead specific facts that might support habeas-corpus relief" to advance legal theory); *Ex parte Reynoso (II)*, 257 S.W.3d 715, 717, 723 (Tex. Crim. App. 2008) (good cause found, despite petitioner's "waffling" about whether to waive, because counsel's mistaken interpretation of law contributed to failure to file). The district court's denial of the stay and abeyance was therefore an abuse of discretion. *See Rhines v. Weber*, 544 U.S. 269, 278 (2005) (likely abuse of discretion to deny stay and abeyance where, inter alia, unexhausted claims "potentially meritorious"). Moreover, *Ramirez* itself now places a premium on allowing one round of fair fact development in state court, because it limits the availability of federal fact development. This Court should therefore remand to allow Mr. Tabler a renewed opportunity to seek a stay and abeyance below.

For these reasons, this Court should determine that counsel's abandonment and ineffectiveness excuse the default of his state habeas IATC claims. It should therefore consider the IATC claims on the merits. At a minimum, it should remand for reconsideration of Mr. Tabler's stay and abeyance motion in light of *Ramirez.*

D. Counsel's Abandonment and Ineffective Assistance Caused Actual Prejudice Because the IATC Claims Counsel Could Have Presented Had Merit.

A habeas petitioner seeking to excuse a default by showing state habeas counsel's ineffectiveness must demonstrate actual prejudice, meaning that "there is 'a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Canales*, 765 F.3d at 568 (quoting *Strickland,* 466 U.S. at 694) (alteration in original).

Point II below, alone and in combination with the other IATC claims advanced in Mr. Tabler's concurrently filed *Application to Expand COA*, establishes the merit of the IATC claims that Mr. Tabler could have presented. There is a reasonable probability that, if state habeas counsel had developed and presented the claim below and those in the COA-expansion application, the state habeas court would have granted relief.

II. TRIAL COUNSEL'S FAILURE TO CHALLENGE INADMISSIBLE VICTIM IMPACT AND VICTIM CHARACTER EVIDENCE RELATING TO VICTIMS NOT NAMED IN THE INDICTMENT DEPRIVED PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. The Prosecution's Introduction of Inadmissible Victim Impact and Victim Character Evidence Deprived Mr. Tabler of Due Process of Law.

The State brought Mr. Tabler to trial for the killings of Haitham Zayed and Mohamed Amine Rahmouni, not the unadjudicated killings of Amanda Benefield and Tiffany Dotson. Despite that, the prosecution elicited extensive, emotional victim impact and victim character evidence about Ms. Benefield and Ms. Dotson. This extraneous evidence was flatly inadmissible under Texas law.

In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the Supreme Court held that, if the state chooses to permit it, the Eighth Amendment erects no *per se* bar to "evidence about the victim and about the impact of the murder on the victim's family." It nevertheless adhered to earlier precedent forbidding victim impact or victim character evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" as a violation of the Due Process Clause. *Id.* at 825. Texas has defined victim character evidence as "evidence concerning the good qualities possessed by the victim" and victim impact evidence as "evidence concerning the effect that the victim's death will have on others, particularly the victim's family members[.]" *Adams v. Thaler*, 421 F. App'x 322, 333 (5th Cir. 2011) (citations and

quotations omitted). Texas law makes clear that victim impact and victim character testimony relating to a victim not named in the indictment is the type of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) (explaining that "danger of unfair prejudice to a defendant inherent in the introduction of 'victim impact' evidence with respect to a victim not named in the indictment . . . is unacceptably high"); *see also Adams*, 421 F. App'x at 334.[14]

In *Cantu*, the CCA held that it was error to admit victim impact testimony from the mother of a victim not named in the indictment because it was extraneous to the crime charged. *Cantu*, 939 S.W.2d at 637. As in *Cantu*, the prosecution in Mr. Tabler's case introduced victim impact and victim character evidence relating to Ms. Benefield and Ms. Dotson, even though Mr. Tabler was not on trial for their killings.

Ms. Benefield's grandmother, Carroll Vaughn, described Ms. Benefield's victimization as a child and her good character. Ms. Benefield's "step father raped her . . . [and] left her in a tub of blood for dead which he is now serving a life sentence with no parole." 26.RR.67, ROA.6557. The prosecutor then elicited the following victim character evidence:

[14] *Cantu* was decided on January 29, 1997, more than two months before Mr. Tabler's trial.

> Even though everything that Amanda Kay went through, she was . . . a happy girl. She loved life . . . . But I think all Amanda Kay ever really wanted was to love that she never had. And to me that's what she was searching for, all of her life was this love. And I think it's so sad the life she lived as a brutal death that she had.

26 R.R. 71, ROA.6561.

The prosecution next presented Ms. Dotson's stepmother, Mary Dotson. She testified that Ms. Dotson was an "outgoing, fun-loving child" and that "[s]he was a big animal lover . . . . [S]he would bring an animal home and want to keep it, and I'd say, you know we already got two dogs and three cats, sorry. And she'd get all mad but . . . she loved us and looked up to us." 26.RR.78, ROA.6568. Mary Dotson then described the effect of Ms. Dotson's death on her family: "[s]he was the love of our life. I called her the daughter of my heart." 26.RR.78, ROA.6568. When Mary Dotson learned that her stepdaughter had been killed "it was the nightmare that parents have when you let your children go out and – and go. And sometimes bad things happen and this is – that was the worst. It was horrible." 26.RR.81, ROA.6571. Ms. Dotson's death affected an entire community: "[t]he church that we had her funeral at was packed. There was standing room only." 26.RR.80, ROA.6570.

The prosecution's presentation of this prejudicial extraneous victim impact and victim character evidence violated Mr. Tabler's due process rights under the Fourteenth Amendment to the United States Constitution and was inadmissible

under Texas law. *See Cantu*, 939 S.W.2d at 637 (explaining that "such evidence serves no purpose other than to inflame the jury."). Despite this clear error, Mr. Tabler's counsel failed to object to its admission.

B. Trial Counsel Was Ineffective For Failing to Object to This Prejudicial and Inadmissible Evidence.

Counsel's failure to object deprived Mr. Tabler of the effective assistance of counsel. U.S. Const. amend VI. An attorney's performance is deficient when the attorney fails to "research relevant facts and law, or make an informed decision that certain avenues will not be fruitful." *United States v. Conley*, 349 F.3d 837, 841 (5th Cir. 2003) (citation and quotations omitted). To that end, counsel has a duty to raise meritorious objections "based on directly controlling precedent[.]" *Id.; see Hinton*, 571 U.S. at 274 (finding trial counsel deficient for failing to request additional expert funding because he did not know about state statute that would have allowed reimbursement and noting that "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*") (citing *Williams v. Taylor*, 529 U.S. 362, 395 (2000), and *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)). At the time of Mr. Tabler's trial, *Cantu* established that extraneous victim impact and victim character evidence were inadmissible under Texas law. Counsel's failure to object was deficient performance.

That deficiency prejudiced Mr. Tabler at the penalty phase. It is reasonably probable that the testimony of Mary Dotson and Carroll Vaughn played a substantial role in the jury's decision to sentence Mr. Tabler to death. Had counsel objected to the improper questioning, the objection would have been sustained and the jury would have never heard heart-rending descriptions of Ms. Benefield's and Ms. Dotson's personal qualities, relationships with their families, and tragic lives, or learned of the effects of their killings had on family and community. There is a reasonable probability that, without this emotional testimony, the outcome of trial would have been different.

The district court agreed with the Respondent's concession that at least "some" of this testimony "may have been erroneously admitted without objection." ROA.7490. It ruled, however, that it need not decide whether counsel's failure to object was deficient. In the court's view, Mr. Tabler had not demonstrated prejudice because "any error . . . was harmless beyond a reasonable doubt." Because the two witnesses' testimony spanned only sixteen pages out of 625 in which the State presented evidence of four murders and a history of bragging and threats to law enforcement, there was no reasonable probability of a different outcome if counsel had objected. ROA.7491.

The district court's analysis fell short in several respects. First, its quantitative page-weighing approach to assessing prejudice discounted the heavy emotional

clout of live testimony by two women grieving for their lost children. This error alone could have tipped the balance toward death.

Furthermore, the district court failed to consider trial counsel's failure to object in context: counsel's overall performance was pervasively deficient, and the proper assessment of prejudice was cumulative.[15] Counsel were deficient not only because they failed to object to emotionally devastating, inadmissible evidence, but also because they failed to investigate and present readily available evidence of Mr. Tabler's chaotic, neglected background and his medical and mental illnesses, failed to prepare and present the limited evidence they did obtain, and abandoned their own experts' diagnoses in summation. Counsel were ineffective because their deficiencies were numerous and the numerous deficiencies were cumulatively prejudicial. *See Application to Expand COA*, Point II.

Because counsel's performance was deficient and because that performance prejudiced Mr. Tabler, both individually and in combination with other deficiencies set forth in his concurrently filed COA application, he should receive habeas relief.

[15] *Strickland* requires courts to determine whether counsel's "errors" – plural – created a reasonable probability of a different result. *Strickland*, 466 U.S. at 695; *see, e.g.*, *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding that courts should examine cumulative impact of trial counsel's errors across both trial and sentencing); *see also Dodson v. Stephens*, 611 F. App'x 168, 178-79 (5th Cir. 2015) (citing cases).

CONCLUSION

For the reasons in Point I above, the Court should reverse the district court's order and excuse any default of Mr. Tabler's state habeas rights because of the abandonment and ineffective assistance of his state habeas counsel, or remand for a hearing on that issue. In the alternative, the Court should consider whether to excuse default or order a hearing for the reasons in Point I above cumulatively with the reasons in Point I of his *Application to Expand COA*, filed concurrently with this *Brief on the Merits*.

For the reasons in Point II above, the Court should reverse the district court's order and remand for a hearing and, ultimately, grant of habeas relief. In the alternative, the Court should grant a hearing and relief for the reasons in Point II cumulatively with those in Point II of his *Application to Expand COA*, filed concurrently with this *Brief on the Merits*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused the foregoing to be served on the following person by ECF filing:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's order of July 6, 2022, granting each side an additional 9,500 words, for a total of no more than 22,500 words, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 20,960 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Microsoft Office Professional Plus 2019 Suite, in 14-point Times New Roman font.

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Dated: August 1, 2022

No. 22-70001

CAPITAL CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD TABLER,

Petitioner - Appellant,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent – Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION
CIVIL ACTION NO. W-10-CA-034-RP

APPLICATION TO EXPAND CERTIFICATE OF APPEALABILITY

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RICHARD TABLER,	:	**No. 22-70001**
	:	
Petitioner-Appellant,	:	**CAPITAL HABEAS CORUPS**
	:	
v.	:	**On Appeal from the United States Court for the Western District of Texas, Waco Division**
	:	
BOBBY LUMPKIN,	:	
	:	
Respondent-Appellee.	:	**Civil Action No. W-10-CA-034-RP**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of the Court may evaluate possible disqualifications or recusal.

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PRELIMINARY STATEMENT RESPECTING CITATION AND FORM

Petitioner cites the Record on Appeal as required by Fifth Circuit Court of Appeals Form 1: ROA.___. He cites excerpts from the record as RE___. The record of the first appeal in this Court is cited as R.___, and excerpts from the record for that appeal as RE1.___.

State court proceedings in the Bell County Reporter's Record prepared for direct appeal are cited as [Volume number] RR [page number]. Pleadings and orders in the Bell County Clerk's Record are cited the same way: [Volume number].CR.[page number].

The opinions of the Texas Court of Criminal Appeals, the district court, and this Court appear in the record excerpts. They are cited by reference to the Record on Appeal and, where available, the official or unofficial Westlaw citations.

All emphasis is added unless otherwise indicated; parallel citations are omitted.

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STANDARD FOR CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253(c)(2), a habeas court should grant a certificate of appealability ("COA") upon a "substantial showing of the denial of a federal constitutional right," which requires a showing that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quotation omitted). A petitioner seeking COA must show "that a procedural ruling barring relief is itself debatable among jurists of reason." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quotation omitted). "[T]he nature of the penalty in a capital case is an appropriate consideration for determining whether to issue a COA[.]" *Clark v. Johnson*, 202 F.3ed 76, 764 (5th Cir. 2000).

REASONS FOR GRANTING COA

Mr. Tabler's concurrently filed *Brief on the Merits* describes the constitutionally ineffective representation he received at trial and in state habeas proceedings, and the evidence effective counsel could have developed and presented. This application seeks to expand the limited COA granted by the district court to address additional grounds both excusing the default of his ineffective-assistance-of-trial-counsel ("IATC") claim and meriting habeas relief. The merits brief also explains why 28 U.S.C. § 2254(e)(2), as interpreted in *Shinn v. Ramirez*,

142 S. Ct. 1718 (2022) poses no obstacle to federal evidentiary development of all the additional evidence that counsel's ineffectiveness excuses Mr. Tabler's default.

I. REASONABLE JURISTS COULD DEBATE WHETHER STATE HABEAS COUNSEL'S MISTAKES OF LAW, ABANDONMENT DURING AND AFTER THE WAIVER HEARING, AND FAILURE TO INVESTIGATE COMPETENCY, VOLUNTARINESS, AND MITIGATION COLLECTIVELY EXCUSED MR. TABLER'S DEFAULT OF HIS STATE HABEAS RIGHTS.

The state court record shows that state habeas counsel made no objection at the waiver hearing when the court gave Mr. Tabler legally incorrect instructions about the deadline for a decision whether to waive his state habeas rights. Because counsel abandoned Mr. Tabler at that hearing, or at least rendered extraordinarily deficient assistance by refusing to participate, 28 U.S.C. § 2254(e)(2) poses no obstacle to federal evidentiary development of all the additional evidence that counsel's ineffectiveness excuses Mr. Tabler's default. Extra-record evidence shows that counsel also gave incorrect advice about the deadline to waive; failed to engage in advocacy before, during, and after the waiver hearing; and failed to conduct a minimally reasonable investigation of either grounds for finding the waiver incompetent and involuntary or for seeking state habeas relief. Reasonable jurists could debate whether those reasons, separately or collectively, excused the default. This Court should accordingly expand the grant of COA to include the points below.

A. State Habeas Counsel Gave Petitioner Legally Erroneous Advice About His Habeas Filing Deadline, Which Prevented Him From Making a Knowing, Intelligent, and Voluntary Waiver.

1. The Erroneous Legal Advice Mr. Tabler Received From the Court and Counsel Prevented a Valid Waiver.

Under Texas law, an applicant must file a state habeas petition "not later than the 180th day after the date the convicting court appoints counsel . . . or not later than the 45th day after the date the state's original brief is filed on direct appeal . . . whichever date is later." Tex. Code Crim. Proc. Ann. art. 11.071 (a). The state court record shows that, despite these provisions, state habeas counsel made no objection to the court's repeated erroneous advice during the waiver hearing that the state habeas proceeding would take place sequentially, after direct appeal, instead of simultaneously with the direct appeal. *See, e.g.*, ROA.3098 ("if your direct appeal is affirmed you may proceed with your appeal by filing a petition for writ of habeas corpus in state court"); ROA.3098-99. The court cemented the concept of sequential review, asking: "you don't want to continue your appeals after your direct appeal has concluded?" ROA.3100. The acquiescence of both counsel and Mr. Tabler in the court's incorrect description shows the same incorrect understanding. Mr. Tabler said: "I'm asking the Court of Appeals to drop all of my appeals *after my direct appeal*. And should my direct appeal be denied, I'm asking for an execution date as soon as possible." ROA.3101.

Off the record, on at least two occasions, Mr. Schulman also told Mr. Tabler that his waiver deadline would not arrive until direct review ended. Mr. Schulman wrote: "The reality is that you will be with us until your direct appeal is over. After that, presuming your appeal is not successful, you can choose not to take further steps to obtain relief." ROA.1210. Mr. Tabler received the same incorrect advice from his direct appeal counsel, Karyl Krug, that same month. ROA.1207. A year later, on July 17, 2008, with direct review still pending, Mr. Schulman wrote:

> Nothing, literally nothing, will happen in your case until the Court of Criminal Appeals issues its opinion on your direct appeal and so it is definitely in your best interest to put this decision off until the first day it can have any real effect.

ROA.1307. The available documents contain no indication that Mr. Schulman, or Ms. Krug, ever told Mr. Tabler how the statute operated.

Because Mr. Schulman gave Mr. Tabler inaccurate legal advice and did nothing to correct the court's inaccurate legal advice, his performance was deficient. In *Hinton v. Alabama*, 571 U.S. 263, 274-75 (2014), trial counsel failed to request additional funding to replace an expert he knew was inadequate because he did not know a state statute would have allowed reimbursement. The Court ruled counsel's performance deficient because of his "ignorance on a point of law" and "failure to perform basic research." *Id.*; *see also Williams v. Taylor,* 529 U.S. 362, 395 (2000) (deficient performance because counsel "incorrectly thought that state law barred access" to helpful records); *Kimmelman v. Morrison,* 477 U.S. 365, 385 (1986)

(counsel deficient for "mistaken belie[f] that the State was obliged to take the initiative and turn over all of its inculpatory evidence"); *Anaya v. Lumpkin*, 976 F.3d 545, 552-53 (5th Cir.) (counsel deficient for inaccurately telling his client he had viable justification defense, causing client to reject plea; contrary conclusion would unreasonably apply *Hinton*), *cert. denied*, 141 S. Ct. 2703 (2021). Other courts have held counsel deficient for ignorance of applicable time limits. *Risjan v. Wetzel,* No. 3:15-cv-268, 2019 WL 3146207, at *32-33 (M.D. Pa. July 15, 2019); *United States v. Ciavarella*, No. 3:09-cr-272, 2018 WL 317974, at *6-7 (M.D. Pa. Jan. 8, 2018), *aff'd* 765 F. App'x 855 (3d Cir. 2019).

Mr. Tabler's state habeas counsel did not know the relevant time limits, and their ignorance of the law was deficient performance. It was not true, as the court and counsel told him, that his state habeas proceeding would begin only after the direct appeal ended. ROA.1210, ROA.1307. If Mr. Tabler failed to file a timely state habeas petition, due well before the end of direct review, he would have only severely limited options for filing it out of time. *See* Tex. Code Crim. Proc. Ann. art. 11.071, §4A. Given counsel's awareness that Mr. Tabler seesawed between wanting to waive and wanting to pursue his habeas case, this issue was "fundamental to his case," and counsel had a corresponding duty to provide legally correct advice. *See Hinton*, 571 U.S. at 274. It was extraordinarily deficient for counsel to allow him to

go forward without giving him accurate advice about the date after which his avenue of escape from that decision would irrevocably close.

Counsel's deficiency caused Mr. Tabler "actual prejudice," *see Canales v. Stephens*, 765 F.3d 551, 568 (5th Cir. 2014), because there is a reasonable probability that he would not have waived his right to state habeas review if he had understood the imminence of his deadline to file or that he would have timely retracted his waiver. The Supreme Court has found *Strickland* prejudice may occur in analogous circumstances, when attorneys' legal ignorance or deficiency influenced clients' decisions to plead guilty or reject plea offers. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Lafler v. Cooper*, 566 U.S. 156, 162-63, 174 (2012) (citing *Missouri v. Frye*, 566 U.S. 134 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010)).

In this case, there is a reasonable probability that Mr. Tabler would have accepted counsel's assistance and pursued relief instead of waiving his rights. His dramatic communications announcing an intention to waive his state habeas rights show that he did not understand that his actual deadline to make a presumptively irrevocable decision was fast approaching, but instead viewed that deadline as still comfortably far off. *E.g.*, ROA.1283 ("Should that appeal be denied, I'm asking that no other appeals be turned in on my behalf."); *see also* ROA.1282, ROA.1294-96. Mr. Tabler's later actions confirm that he inaccurately believed that state habeas

review would remain available until direct review ended. The direct appeal was still pending in July 2009 when he directed his attorneys to attempt to retract his waiver, and he did not attempt to waive again between then and the direct appeal ruling on December 16, 2009. *Tabler v. State*, No. AP-75,677 (Tex. Ct. App.) (unpublished), 2009 WL 4931882, ROA.1020, ROA.3287-93.

It is reasonably probable that, if Mr. Tabler had understood at the hearing in September 2008 that his decision would become final 45 days after the imminent filing of the State's direct appeal brief, he would have allowed his state habeas proceedings to continue. Therefore, state habeas counsel's incorrect advice about Mr. Tabler's deadline to file caused him to forgo the meritorious IATC claims set forth below, excusing his default of those claims in state court.

2. Counsel Failed to Advance Their Own Legal Error and Deficient Advocacy as the Strongest Arguments Available to Secure Mr. Tabler's Desired Reinstatement of His State Habeas Rights.

As the state court record showed, Mr. Tabler's attorneys not only gave Mr. Tabler incorrect advice *before* he waived in 2008 but also failed to make the strongest argument for reinstating his rights in July 2009—their own error of misinforming him, and acquiescing in the court's misinforming him, about his deadline to file. At the time they moved to reinstate, they labored under a conflict of interest or, at a minimum, were deficient for failing to make the argument.

In *Maples v. Thomas*, 565 U.S. 266, 285 (2012), the Supreme Court explained that a "significant conflict of interest" faces attorneys whose best argument for overcoming a missed deadline is their own fault in missing it. The Court recognized a similar conflict in *Christeson v. Roper*, 574 U.S. 373, 378 (2015). This Court, likewise, recognized when it remanded Mr. Tabler's case to the district court that the same type of conflict could prevent his state habeas counsel from making the best argument in federal court for overcoming the state court default. *Tabler v. Stephens*, No. 12-70013, 591 F. App'x 281 (5th Cir. 2015); ROA.1019.

The state court record, with the record proffered below, does establish that Mr. Schulman and Mr. Jasuta had a conflict of interest, and at least rendered deficient performance, when they moved to reinstate Mr. Tabler's state habeas rights in 2009. They conceded Mr. Tabler's competence and argued only that his vacillation demonstrated his "inability to make sound decisions," ROA.3290-91, without making the more powerful argument that his waiver was a product of their own ignorance of the statutory deadline, failure of advocacy at the waiver hearing, and deficient failure to investigate his case.

Such an argument would have had ample support under Texas law, which assumes that a state habeas petitioner will have "one full and fair opportunity" to present his claims. *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002). Article 11.071, § 4A, provides that the Court of Criminal Appeals ("CCA") may

command counsel who files an untimely application or fails to timely file to "show cause," after which the court may appoint new counsel and establish a new filing date. When an applicant's counsel makes mistakes not attributable to the applicant, the CCA has repeatedly given the applicant a single "bite at the apple" by finding "good cause" under § 4A. *See, e.g.*, *Ex parte Medina*, 361 S.W.3d 633, 637, 643 (Tex. Crim. App. 2011) (good cause where counsel "intentional[ly] refus[ed] to plead specific facts that might support habeas-corpus relief" to advance legal theory); *Ex parte Reynoso (II)*, 257 S.W.3d 715, 717, 723 (Tex. App. 2008) (good cause found, despite petitioner's "waffling" about whether to waive, because counsel's mistaken interpretation of law contributed to failure to file); *Ex parte Bigby*, WR-34,970-02, 2008 WL 5245356 (Tex. Crim. App. Dec. 17, 2008) (good cause found for "a simple miscalculation of the dates"); *Ex parte Murphy*, WR-70,832-01 (Tex. Crim. App. Mar. 25, 2009) (good cause found where extension motion filed after deadline due to counsel's misreading of statute).

In Mr. Tabler's case, his attorneys' continuing ignorance, their conflict of interest, or both, prevented him from taking advantage of the favorable body of Texas law that guaranteed him "one full and fair opportunity." *Kerr*, 64 S.W.3d at 419. According to the incorrect legal advice he had received, he still had time to change his mind about waiver at the time he asked his attorneys to reactivate his state habeas proceedings because the CCA had not yet decided his case. Like the law

firm in *Maples*, his attorneys could have stepped aside to allow unconflicted counsel to offer their legal error and other deficient performance as good cause to reinstate, but instead they filed a pro forma motion that placed the only blame for the waiver on Mr. Tabler's poor judgment. Because there is a reasonable probability that the CCA would have reinstated Mr. Tabler's rights if presented with the evidence of his attorneys' ignorance of the law and its impact on his waiver decision, their deficient performance prejudiced his state habeas rights and constituted cause for his default of substantial IATC claims.

3. The District Court's Opinion

The district court's cursory discussion of this ground for relief rested on a clearly erroneous finding of fact, that "Petitioner was aware of the relevant filing deadlines." ROA.7441. The record summarized above shows that Mr. Tabler did not know the relevant deadlines, because his counsel and the court, without objection, gave him incorrect advice. This fact-finding was clearly erroneous.

The district court also relied on this Court's ruling on the initial appeal from denial of habeas relief. The district court wrote:

> Even if Petitioner was misled about the deadline for filing a state habeas petition, such an error would be harmless because petitioner was *waiving his right* to such collateral review. *See Tabler v. Stephens*, 588 F. App'x at 303, fn.5[.]

ROA.7441. This Court made that ruling on the basis of the record made by the same attorneys who misadvised Mr. Tabler about his filing date and without the benefit of

the arguments presented and the record developed on remand. The Court's second opinion, moreover, withdrew this ruling because of state habeas counsel's conflict of interest and remanded to the district court to determine *Martinez* cause and prejudice. 591 F. App'x at 281, ROA.1019.

In remanding the case, this Court recognized that state habeas counsel's ineffectiveness could render the waiver invalid. The district court's reliance on this Court's vacated opinion to support a conclusion that the waiver rendered counsel's inaccurate advice harmless, accordingly, was legal error. At a minimum, reasonable jurists could differ over whether there is a reasonable probability that state habeas counsel's provision of erroneous advice about Mr. Tabler's filing deadline caused him actual prejudice. This Court should therefore grant a COA and, ultimately, a hearing and habeas relief on this ground, alone and in combination with the other grounds set forth in this pleading.

B. State Habeas Counsel's Deficient Advocacy and Abandonment Before, During, and After the Waiver Hearing Prevented Mr. Tabler From Making a Valid Waiver.

The concurrently filed *Brief on the Merits*, Point I, explains that state habeas counsel abandoned their advocacy role during the waiver hearing despite their knowledge of Mr. Tabler's mental illness, fluctuating desires, and delusional ideas about threats and persecution. Counsel also performed deficiently before the hearing and continued their abandonment after it.

1. Counsel's Deficient Performance Regarding Waiver Before the Hearing Culminated in Abandonment of an Advocacy Role During and After the Hearing.

a. Counsel's pre-hearing performance was extraordinarily deficient.

During a June 6, 2008, phone call with Judge Trudo, Mr. Schulman disclosed his "client's stated intent to end all appeals." ROA.1298. This breach of confidentiality was not only improper but factually incorrect: Mr. Tabler had said he was "not too sure" and was delaying decision until "after my direct appeal." ROA.1294. The available records provide no evidence that Mr. Schulman objected to the judge's suspension of investigation funding or told the judge how unstable Mr. Tabler's decisions had been. Because neither Mr. Schulman nor the court knew the filing deadline, he could not argue, as he should have, that no waiver could take effect until the deadline, and that he had an obligation to continue his representation until that date. *See Reynoso II*, 257 S.W.3d at 720 n.2 ("Because an applicant can waffle in his decision until the day the application is due, a 'waiver' is not truly effective until after that date has passed.").

Counsel's breach of confidentiality, failure to argue helpful principles of law, and failure even to preserve for review an objection to the court's embargo on investigation funds were deficient performance. *Cf. O'Rourke v. Endell*, 153 F.3d 560, 569 (8th Cir. 1998) (waiver proceeding violated due process because no counsel argued against client's competence or voluntariness).

b. Counsel abandoned Mr. Tabler and rendered ineffective assistance during the hearing.

Mr. Tabler's argument on this point appears in Point I of the *Brief on the Merits*.

c. Counsel abandoned Mr. Tabler after the hearing.

Under Texas law, state habeas counsel has an ongoing duty to investigate and develop a client's habeas claims even after an expressed intention to waive and competence finding, because the client may have a change of heart. Tex. Stat. Ann. 11.071 § 3(a). As a result, counsel whose client seeks to waive must "either (1) move to withdraw from the case, or (2) diligently pursue the investigation despite his client's protests." *Reynoso II*, 257 S.W.3d at 720 n.2. In Mr. Tabler's case, state habeas counsel demonstrated unreasonable ignorance of the state law requiring continued representation. *See Hinton*, 571 U.S. at 274-75; *Canales*, 765 F.3d at 569 ("mistaken belief" regarding state law provided "cause" to overcome default).

Instead of attempting after the hearing to protect the interests of a client who, they knew, could not voluntarily or competently protect himself and who would likely again change his mind about waiving, counsel continued to abdicate responsibility. At the end of the hearing, counsel could have pointed out that the waiver could not take effect for at least 45 more days and renewed the request for investigation funds. Instead, Mr. Schulman prompted the court to "release" him and Mr. Jasuta from further "actions." 6.RR.368, ROA.3107.

The State filed its brief on direct appeal on October 1, 2008, which meant that Mr. Tabler's state habeas petition was due 45 days later, on November 17. *See* State's Brief, *Tabler v. State*, 2008 WL 5191415 (Tex. Crim. App. Oct. 1, 2008).[1] Mr. Schulman and Mr. Jasuta had no contact with him between the date of the hearing and the date his time to file expired. ROA.3693. Thus, counsel's abandonment of an advocate's role, not only during the waiver hearing but from that date until the expiration of Mr. Tabler's time to file, was complete.

2. Counsel's Deficient Advocacy and Abandonment Resulted in an Involuntary and Incompetent Waiver.

As described in the *Brief on the Merits*, Fifth Circuit law, applying binding Supreme Court precedent, employs a three-part test of competence. *See Rumbaugh v. Procunier*, 753 F.2d 395, 396 (5th Cir.1985); *see also Mata v. Johnson*, 210 F.3d 324, 328 (5th Cir. 2000). A court must ask whether the petitioner suffers from a mental disease or defect, whether any such disease or defect prevents the petitioner from understanding his or her legal position and options, and even if not, whether any such disease or defect prevents him or her from making a rational choice among the options. *Rumbaugh*, 753 F.2d at 398. The third inquiry incorporates a

[1] The 45th day, November 15, fell on a Saturday in 2008. The next business day was Monday, November 17.

voluntariness requirement. *See Mata*, 210 F.3d at 329 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brady v. United States*, 397 U.S. 742, 748 (1970)).

Not only did counsel abandon Mr. Tabler during the hearing, but they failed to protect his interests before the hearing and did nothing for him, continuing their abandonment, after the hearing. They never made the showing, as they could have, that the *Rumbaugh* test was satisfied. The entire course of state habeas counsel's extraordinarily deficient performance and abandonment, alone and in combination with the other instances of ineffective assistance set forth above and below, excuses any default of state habeas review.

3. The District Court Misconstrued and Overlooked Mr. Tabler's Arguments on this Point.

Mr. Tabler's argument respecting the district court opinion appears in the *Brief on the Merits*. For those reasons and the reasons set forth here, reasonable jurists could differ about whether the district court erroneously rejected Mr. Tabler's cause-and-prejudice argument on this ground. Accordingly, this Court should grant COA on this ground and, ultimately, relief on the underlying IATC claims, alone and in combination with the other grounds in this pleading.

C. State Habeas Counsel's Deficient Investigation Ensured That Mr. Tabler Could Not Make A Knowing and Voluntary Decision Whether To File.

State habeas counsel also unreasonably failed, from the beginning of their representation, to conduct a mitigation investigation adequate to determine whether

trial counsel had rendered IATC. At the time of Mr. Schulman's ex parte call with Judge Trudo in May 2008, over a year after his assignment in April 2007, he had not yet completed the most basic investigation tasks such as obtaining trial counsels' files. ROA.1260-06. His time sheets show that, after the June 2008 call, he took no other investigative action except for receiving Dr. Harrison's report. ROA.1200-02.

As a result, it was impossible for Mr. Schulman and Mr. Jasuta to tell their client, and impossible for Mr. Tabler to know, anything about the potential claims he was giving up. As a result of counsel's deficient performance, Mr. Tabler could not make a knowing decision about whether to file under state law because (as discussed above and in the *Brief on the Merits*) counsel could not give the state habeas court readily available evidence of Mr. Tabler's substantial congenital brain damage, and other impaired functioning that undermined the competency and voluntariness of any putative waiver of his rights. *See Ex parte Reedy*, 282 S.W.3d 492, 494-96, 498 (Tex. Crim. App. 2009) (waiver of state habeas unenforceable if counsel fails to advise of "the particulars" of claims; waiver not knowing or intelligent). Binding Supreme Court precedents requiring knowing waiver of constitutional rights reinforce the Texas courts' position. *See Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Under this standard, Mr. Tabler's purported waiver was unenforceable. State habeas counsel abandoned him and failed to investigate and develop his case. Without their assistance, Mr. Tabler could not reasonably have known about any claims relying on extra-record evidence, including the facts underlying his IATC claim for failure to investigate, develop, and present mitigating evidence. Dr. Harrison's two-page letter underscores Mr. Tabler's lack of understanding. He wrote that "Although [Tabler] understands there may have been varying degrees of possible trial error which resulted in his conviction, his knowledge understandably weakens when it comes to all the legal possibilities which could result in a possible suspension of the death sentence." ROA.1934.

Without the facts he needed to make an informed decision, Mr. Tabler could not knowingly decide whether to file or waive.

The district court rejected this argument largely on the factually mistaken ground that in fact state habeas counsel "conducted an extensive investigation[.]" ROA.7441. Even without the hearing Mr. Tabler requested, the record contradicted the district court's factual findings. According to the court, counsel "began a mitigation investigation with the assistance of two mitigation specialists." ROA.7441. The first had worked for trial counsel, and rejected Mr. Schulman's outreach without ever performing any work on the state habeas case because a conflict of interest prevented him from "reviewing my own work." ROA.1241. The

second specialist met Mr. Tabler once, reviewed records, and consulted with Mr. Schulman. ROA.1272. Her work came to an abrupt halt without a single witness interview, and the court never funded her further investigation, once counsel advised the court (misleadingly) that Mr. Tabler had said he intended to waive his right to file. Describing her work as the "beginning" of a mitigation investigation overstates its extent. The district court's foundational fact-finding was therefore clearly erroneous.

The district court also relied on Mr. Schulman's retention of Dr. Harrison to conduct a neuropsychological examination and his correspondence with Mr. Tabler. ROA.7441. Neither of those activities, however, constituted a background investigation. Moreover, Mr. Schulman made no use of Dr. Harrison's full report to advise Mr. Tabler about available mitigating evidence (since he did not communicate with Mr. Tabler between the date he received it and the date of the waiver hearing, ROA.1329), to contest the waiver, or to advocate for investigation funds.

The district court not only relied on clearly erroneous fact-finding but committed legal error in rejecting Mr. Tabler's challenge to state habeas counsel's lack of investigation and consequent failure to ensure he made an informed decision about the claims he was giving up. At the very least, jurists of reason could debate

the deficiency of counsel's performance. This Court should accordingly grant COA and, ultimately, an evidentiary hearing and relief on this ground.

D. State Habeas Counsel's Failures Prevented Mr. Tabler From Making A Knowing, Intelligent, and Voluntary Decision Whether To Waive.

Each of state habeas counsel's failings was individually deficient. Even if not, they were cumulatively deficient and directly affected Mr. Tabler's decision to waive his state habeas rights. *See Koon v. Cain*, 277 F. App'x 381, 386 (5th Cir. 2008) (observing that counsel's multiple missteps "emphasize the egregiousness of [counsel's] deficient representation, . . . as well as the cumulative prejudicial [effect] of these multiple deficiencies.").

State habeas counsel knew their client was severely mentally ill, with a history of suicidal gestures and unstable decisions. That alone was enough to require counsel to protect their client's best interests by opposing his decision to waive and advocating for a finding of incompetency and involuntariness. But counsel also failed to conduct the minimally adequate investigation that would have provided both the tools for effective advocacy and the information Mr. Tabler needed to make an informed decision about what he was giving up. Most importantly, counsel gave their impulsive client inaccurate legal advice about his deadline to waive and stood silent when the court reiterated the incorrect advice, leaving Mr. Tabler with the impression that he could make grand gestures now and retract them later.

Individually and collectively, these numerous failings prevented Mr. Tabler from making a competent and a knowing, intelligent, and voluntary decision to waive, and prevented the state habeas court from making an accurate assessment of his capacity to make a valid waiver. *See Rumbaugh*, 753 F.2d at 398.

There is strong contemporary evidence that, but for state habeas counsel's deficient performance, Mr. Tabler would have decided to file a timely application. Mr. Tabler's cellphone calls to state Senator Whitmire indicate that Mr. Tabler wanted to resume his habeas proceedings. Hearing Before the S. Comm. on Crim. Just., 80th Legislature, interim Sess. (Tex. Oct. 21, 2008) (statement of Sen. John Whitmire, Chair), http://tlcsenate.granicus.com/MediaPlayer.php?clip_id=1203 (video at 6:04-6:20) (visited July 27, 2022). Mr. Tabler's request to reinstate his proceedings on June 9 (before the incorrect deadline he was given) further indicates he would likely have decided to do so had counsel given him the true deadline. Indeed, Mr. Tabler was very eager to assist his attorneys with attempts to investigate and develop his claims. *See, e.g.*, ROA.1232; ROA.1212; ROA.1222, ROA.1280. There is a reasonable probability that he would have been swayed by state habeas counsel's investigative efforts to file a petition. This differentiates him from the petitioner in *Schriro v. Landrigan,* 550 U.S. 465, 477 (2007). If habeas counsel had given accurate legal advice and conducted an adequate investigation, evidence shows that Mr. Tabler would not have blocked its presentation.

E. Counsel's Deficient Performance Caused Actual Prejudice Because the IATC Claims Counsel Could Have Presented Had Merit.

A habeas petitioner seeking to excuse default by showing state habeas counsel's ineffectiveness must demonstrate actual prejudice. *Canales*, 765 F.3d at 568 (quoting *Strickland,* 466 U.S. at 694). The sections below establish the merit of the IATC claims that Mr. Tabler could have presented. They explain why there is a reasonable probability that, if state habeas counsel had developed and presented the claims, the state habeas court would have granted relief individually and cumulatively, or, at a minimum, why jurists of reason could differ on their merit, both individually and cumulatively. This Court should therefore expand COA to address the multiple grounds on which state habeas counsel's abandonment and extraordinarily ineffective assistance excuse the default of Mr. Tabler's meritorious IATC claims.

II. JURISTS OF REASON COULD DEBATE WHETHER TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE.

Mr. Tabler stood trial for his life represented by attorneys who ineffectively failed to implement their own strategy. Trial counsel failed to conduct the constitutionally required background investigation that would have disclosed his congenital birth defects (Klinefelter's Syndrome or KS and Fetal Alcohol Spectrum Disorder or FASD) and firsthand accounts of his neglected, chaotic upbringing. Their failure to undertake this foundational work had ripple effects throughout the

trial and was exacerbated by other failures. Counsel failed to prepare and present expert testimony supported by the evidence they did have, let alone the voluminous, richly detailed evidence they could have provided. Their experts, as a result, faced dramatically discrediting cross-examination. Counsel made no objection to inadmissible victim impact testimony. In summation, counsel abandoned their own theory and conceded—unnecessarily and inaccurately—that their client was a sociopath. Each of these failings was unreasonable under prevailing professional norms on its own, and they cumulatively amounted to stunningly and extraordinarily deficient performance. Furthermore, counsel's deficiencies prejudiced the penalty phase defense both individually and cumulatively. At the very least, there is a reasonable probability that, but for the combined effect of all counsels' deficient performance, the jurors would have spared Mr. Tabler's life. U.S. Const. amend. VI.

A. The District Court Overlooked Twenty-Four Proffered Declarations By Lay Witnesses And Experts and Imposed a Pleading Requirement That Contradicts the Applicable Habeas Rules.

The district court rejected several penalty phase claims, in substantial part because it viewed Mr. Tabler's allegations as unsupported by "a single affidavit" delineating the content of witnesses' proposed testimony or indicating whether they would have testified at trial. ROA.7472-73, ROA.7484, ROA.7492. It viewed the allegations as "tantamount to sheer speculation." ROA.7473.

The court apparently overlooked Mr. Tabler's supplemental appendix, which included twenty-four declarations from lay witnesses and experts, each stating a willingness to provide the same information to the defense team at the time of trial and—except for his mother and sister, who did testify—a willingness to testify. Mr. Tabler's factual proffers were legally sufficient and procedurally appropriate. Specifically:

- He proffered eighteen lay declarations and five expert declarations made under penalty of perjury. He offered an additional declaration from one of the trial experts, for a total of twenty-four. ROA.924-42, ROA.2478-2542.
- The initial habeas petition set forth a prima facie claim even without the declarations by making specific, detailed factual allegations. ROA.924-61. Neither the federal habeas statute, the rules governing habeas cases, nor the local district court rules require a habeas petitioner to attach affidavits to the initial petition. *See* 28 U.S.C. § 2242; Habeas Rule 2(c)(2); Western District of Texas Local Rule CV-3.
- The cases the district court cited involved not pleading but proof: those petitioners had *never* substantiated their factual allegations with witness statements or other evidence before judgment. ROA.7472, ROA.7484, ROA.7492 (citing *Day v. Quarterman*, 566 F.3d 527, 529-30 (5th Cir.

2009), *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010), and *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002)).

- Mr. Tabler not only pled specific facts but requested an evidentiary hearing to prove them. ROA.990. Rejecting his well-pleaded claims without testing his allegations at an evidentiary hearing violated his right to due process of law. *See, e.g.*, *Herman v. Claudy*, 350 U.S. 116, 119 (1956).

This Court rejected similar reasoning in *Adams v. Quarterman*, 324 F. App'x 340 (5th Cir. 2009). The State argued that the district court had erred in considering "unsubstantiated affidavits." This Court found no error. *Id.* at 350 ("When a petitioner comes forward with affidavits from those non-testifying witnesses attesting under oath as to (1) what they would have said at trial and (2) that in fact they would have testified at trial if they had been asked, we are chary to reject the uncalled witnesses' statements.").

The district court relied on its clearly erroneous belief that Mr. Tabler failed to provide supporting affidavits in its analysis of trial counsel's performance in Claims II.A, B, D, and G of his amended petition. ROA.7472-73, ROA.7484, ROA.7492. The evidence that trial counsel could have developed and presented, however, is also relevant to the overall prejudice resulting from all counsel's deficient performance. The district court's factually and legally erroneous assumption therefore undermined its rejection of the penalty phase ineffective

assistance claim as a whole. Jurists of reason could debate whether a habeas petitioner must include affidavits or other evidence with the initial petition to plead a sufficient prima facie case, and could debate whether Mr. Tabler's proffer required an evidentiary hearing. Thus the Court should grant COA on each of these grounds.

B. Jurists Of Reason Could Debate Whether a Reviewing Court Must Assess Both Counsel's Deficient Performance and the Resulting Prejudice in the Aggregate.

1. When Counsel Exhibit Multiple Deficiencies, Reviewing Courts Must Assess Their Performance as a Whole.

Mr. Tabler presented a single claim that trial counsel were ineffective at the penalty phase. ROA.715. He argued that they were ineffective because they *neither* conducted the constitutionally adequate investigation of background and mental health needed to implement their own strategy, *nor* adequately prepared the witnesses they chose to present, *nor* objected to inadmissible victim impact evidence, *nor* adhered to their own theory of mitigation in summation. Even if counsel could reasonably omit to do one or more of these things, they did none of them, and therefore provided Mr. Tabler constitutionally deficient representation. *Strickland,* 466 U.S. at 687 (performance prong asks whether "counsel made *errors* so serious that" Sixth Amendment violated) (emphasis added); *see also Andrus v.*

Texas, 140 S. Ct. 1875, 1881-82, 1885 (2020) (finding deficient performance based on multiple pervasive failures).[2]

2. The District Court Never Assessed Counsel's Aggregate Performance.

The district court, unlike the Supreme Court in *Strickland* and *Andrus*, never assessed the reasonableness of counsel's performance as a whole. It did not address the cumulative deficiency of counsel's failure to investigate background mitigating evidence and mental health evidence and failure to prepare their own witnesses using the evidence they did possess, nor the additive deficiencies in their failure to object to inadmissible victim impact testimony and non-advocacy for their client's life in summation.

The district court's assessment of cumulative prejudice also misapplied *Strickland*. The court ruled that, because it had not found any individual deficiencies, it had none to cumulate. ROA.7504-05. But throughout the *Memorandum Opinion* the Court alternatively assumed that each of those instances amounted to deficient performance and ruled that each was individually non-prejudicial. Because *Strickland* requires a cumulative assessment of prejudice, the

[2] On remand, the CCA found no *Strickland* prejudice and denied Andrus relief. The Supreme Court denied certiorari. *Ex parte Andrus*, 622 S.W.3d 892 (Tex. Crim. App. 2021), *cert. denied*, *Andrus v. Texas*, No. 21-6001, 2022 WL 2111383 (June 13, 2022).

court should have considered the cumulative prejudicial impact of all the instances of assumed deficient performance.

C. Jurists of Reason Could Debate Each of the Individual Instances of Counsel's Deficient Performance.

1. Counsel Failed to Conduct the Constitutionally Adequate Background Investigation Required in Every Capital Case.

Richard Tabler's trial counsel limited their witness contact to phone calls with Mr. Tabler's parents and sister made by Dr. Jacobitz and attorney Hunt. ROA.6952-53, ROA.1060-83. The only in-person background interview conducted by any member of the defense team was mitigation specialist Byington's single joint meeting with Lorraine Tabler (Richard's mother) and Kristina Martinez (his sister). ROA.1418-20, ROA.2508. No one from the defense ever learned anything about the information available from dozens of other witnesses. As a result, counsel failed to develop a complete or detailed picture of Mr. Tabler's background, or even an accurate one. Collecting records and relying on an expert to touch base by phone with a few immediate family members was not enough to comply with the Eighth Amendment. At a minimum, jurists of reason could disagree about whether this investigation was constitutionally adequate. In fact, many jurists of reason have held that similarly superficial investigations in capital cases were constitutionally

*in*adequate, even though counsel presented some immediate family members and/or experts.[3]

The deficient background investigation prejudiced Mr. Tabler's penalty phase defense. The jurors received a scanty and misleadingly sanitized picture of Mr. Tabler's background from his mother, who focused on her own life history, and sister, who described him in terms that could apply to many children. ROA.6745-78, ROA.6794-813.

The truth of Richard's youth was far more bleak and blighting than his mother and sister acknowledged. The declarations proffered in the district court show that Lorraine Tabler abused alcohol during her pregnancy with Richard and at other times, and had wild mood swings. The children were unsupervised; Kristina had major responsibility for Richard's care from an early age, although she was only seven years old when he was born. Both parents were physically abusive. After their marriage broke up, Lorraine cycled through a series of unstable and often violent

[3] *See Adams v. Quarterman*, 324 F. App'x 340, 2009 WL 1069330 (5th Cir. April 22, 2009); *Walbey v. Quarterman*, 309 F. App'x 795, 2009 WL 113778 (5th Cir. Jan. 19, 2009); *Lewis v. Dretke*, 355 F.3d 364, 367-68 (5th Cir. 2003); *see also DeBruce v Commissioner, Alabama Dept. of Corr.*, 758 F.3d 1263 (11th Cir. 2014); *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012); *Cooper v. Sec'y, DOC*, 646 F.3d 1328 (11th Cir. 2011); *Johnson v. Sec'y, DOC*, 643 F.3d 907 (11th Cir. 2011); *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011); *Williams v. Allen*, 542 F.3d 1326, 1329-30 (11th Cir. 2008); *Gray v. Branker*, 529 F.3d 220, 225-26 (4th Cir. 2008).

relationships with men and stormed in and out of Richard's life. ROA.2503-13, ROA.2489-90, ROA.2497-2501, ROA.2515, ROA.2523-25.

Disinterested witnesses could have testified that Richard was developmentally delayed. He was so slow to walk and talk that adults suspected that he was deaf. He stuttered, and he wet the bed until age eight. He curled up in fetal position and rocked. He had uncontrollable tantrums, continuing long past the age when most children outgrow them. His social reactions were often inappropriate. At puberty, he grew little facial hair and his voice did not change. ROA.2493-94, ROA.2499-2501, ROA.2523-25, ROA.2509.

A reasonably adequate background investigation could have uncovered vivid firsthand accounts by Richard's teachers of his "classic ADHD" behaviors and their laments that his school system had no services for children like him. ROA.2482, ROA.2495-96, ROA.2502, ROA.2517-18. It would have uncovered firsthand accounts of Richard's mood swings and erratic teenage behavior, with stories about his threats and attempts to kill himself, and, later, his alcohol and drug abuse. ROA.2483-86, ROA.2489-92, ROA.2497-98, ROA.2515-16, ROA.2519-22.

In summation, the prosecutor derided the defense testimony about Mr. Tabler's background and upbringing. He questioned the adolescent Richard's ADHD diagnosis (made by a qualified child psychiatrist after appropriate testing)

because none of the experts had cited supporting school records.[4] And he suggested that even the limited testimony of Lorraine Tabler and Kristina Martinez was untrue, because otherwise other family members would have supported it. ROA.7067-74. A reasonably complete defense investigation could have forestalled such arguments.

Jurists of reason have found prejudice in circumstances where insufficient background investigation yields an inaccurate portrayal of a defendant's background at trial. In *Walbey*, for example, the testimony was substantially incomplete and some of it, including Walbey's grandmother's "seriously distorted view of his childhood," was inaccurate; as the magistrate judge observed, it was "scant, bereft in scope and detail." *Id.* at 803-06; *see Adams*, 342 F. App'x at 350-52; *Wessinger v. Cain*, Civil Action No. 04-637-JJB, 2015 WL 4527245, *8-9 (M.D. La. July 27, 2015), *rev'd on other grnds sub nom. Wessinger v. Vannoy*, 864 F.3d 387 (5th Cir. 2017).[5]

In Mr. Tabler's case, the district court's only reason for rejecting this claim was its mistaken belief that he had provided no supporting affidavits to demonstrate reliably what uncalled witnesses could have said. Because the report of social worker Colleen Francis summarized hearsay witness statements, the court dismissed Mr.

[4] In fact, one of Mr. Tabler's high school records reflects the diagnoses. ROA.1452.

[5] *See also Foust*, 655 F.3d at 539; *Johnson v. Mitchell*, 585 F.3d at 943; *Johnson v. Bagley*, 544 F.3d at 602; *Williams v. Allen*, 542 F.3d at 1342; *Gray*, 529 F.3d at 235-38.

Tabler's allegations as "sheer speculation." ROA.7472-73. In fact, the lifetime records and declarations Mr. Tabler provided showed that detailed firsthand evidence and corroboration were readily available. The district court's rejection of Mr. Tabler's demonstration of prejudice as speculation was simply wrong.

Similarly, the district court dismissed the Francis report because it thought "much of what is contained in Ms. Francis's report is not new." ROA.7475. It indicated that the jurors learned Mr. Tabler "had an abusive and neglectful mother." *Id*. The trial evidence, however, only showed that Lorraine Tabler was once institutionalized before Richard's birth and admitted that she got angry easily. ROA.6750, ROA.6771. The jurors never heard that Lorraine beat the children with branches and shoved them into door frames, or that older siblings subjected Richard to physical cruelty. They did not hear firsthand descriptions of Lorraine's volatile behavior. *See* ROA.1435-36, ROA.1440.

The district court also referred generally to testimony that Richard Tabler "exhibited inappropriate social reactions, erratic behavior, suicidal ideation, and classic symptoms of ADHD[.]" ROA.7475. The jurors never heard anyone describe the "many dozens of prominent scars from cuts on both sides of both of his arms." ROA.1591. They never heard about Richard's hospital admission for attempting suicide with pills, or the time he threatened to shoot himself, or another time police

held a siege until they talked him out of shooting himself, or the time he cut his wrists in prison, or other suicide attempts. *See, e.g.*, ROA.1456-64, ROA.2516.

Furthermore, the district court ignored most of the information the jurors never learned at all. They never learned about Lorraine's drinking during her pregnancy, the abusive discipline Richard endured, his uncontrollable tantrums at advanced ages, or his inappropriate social behavior. They never heard accounts from teachers and school administrators of his "classic ADHD" behaviors. And they heard only from Richard's mother and sister, even though a wide range of more disinterested witnesses could have testified. *See* ROA.931-32.

There is a reasonable probability that the firsthand stories that not only family members but also family friends, educators, and acquaintances could have told, alone, would have resulted in a life sentence. The Supreme Court has recognized that in capital sentencing details matter. *See Williams*, 529 U.S. at 398; *Wiggins v. Smith*, 539 U.S. 510, 535, 537 (2003). Details likewise mattered in *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003), where this Court held that the petitioner's grandmother's "conclusional" and "skeletal" testimony failed to give "a true picture of [Lewis's] tortured childhood." *See also Walbey*, 309 F. App'x at 803.

The district court inaccurately equated the amended petition's harrowing details with the undeveloped, misleading trial presentation. As in *Lewis* and *Walbey*, Mr. Tabler's jurors received a sanitized picture of his upbringing from witnesses

with motives to underplay his traumatic past. There is a reasonable probability that the jurors would have reached a different verdict if presented with the truth, and certainly that they would have done so on this ground in combination with the other grounds in this application. At the very least, jurists of reason could debate that conclusion. This Court should therefore expand COA on this ground alone, or at a minimum consider it cumulatively with the other instances of deficient performance described in this application.

2. Counsel Failed to Conduct the Reasonable Investigation of Medical and Mental Health Required By What They Knew or Should Have Known About the Signs of Mr. Tabler's Serious Impairments.

Trial counsel never followed up on the clear signs of mental and medical abnormality that should have prompted them to inquire about symptoms and behaviors during Mr. Tabler's developmental years. Although they retained several mental health experts, they never provided them with the information a reasonable follow-up investigation would have uncovered. Partly as a result, important *medical* disorders— KS and FASD— went undetected, while other disorders received only glancing development and no corroboration. Counsel never obtained necessary follow-up examinations. *See Walbey*, 309 F. App'x at 803-04; *Adams*, 324 F. App'x at 351-52.

The Supreme Court has repeatedly found investigations deficient and prejudicial partly because counsel failed to uncover mitigating mental health

evidence.[6] This Court has also recognized the importance of reasonable mental health investigation. *See Miller v. Dretke*, 420 F.3d 356, 358-64 (5th Cir. 2005) (although counsel elicited lay testimony about brain injury, counsel ineffective for not consulting petitioner's treating professionals); *see also Williams v. Stirling*, 914 F.3d 302, 314 (4th Cir. 2019) (counsel deficient for failing to develop petitioner's FAS, even though counsel did show mother's drinking during pregnancy and petitioner's brain damage).[7]

Even though capital counsel must conduct a reasonably thorough background investigation in every case, in Mr. Tabler's case counsel had specific information requiring a focus on his mental and medical health. As in *Miller*, trial counsel ignored the signals and failed to develop highly relevant evidence. They knew or should have known that:

- Mr. Tabler has an unusual appearance, over six feet tall but with a frail, undeveloped build and undersized testes. He has a high-pitched voice and does not shave. ROA.1433, ROA.1465, ROA.1591, ROA.1634, ROA.1651.

[6] *See Sears v. Upton*, 561 U.S. 945, 956 (2010); *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Rompilla v. Beard*, 545 U.S. 374, 391 (2005); *Wiggins*, 539 U.S. at 535; *Williams*, 529 U.S. at 396.

[7] *Accord Wessinger*, 2015 WL 4527245 at *9; *see also Worthington v. Roper*, 619 F. Supp. 2d 661, 688-89 (E.D. Mo. 2009); *McNeill v. Branker*, 601 F. Supp. 2d 694, 721 (E.D.N.C. 2009).

- Lorraine Tabler, Mr. Tabler's mother, reported that he was born blue, almost black, because of fluid in his lungs. ROA.6751.
- Robert Tabler, Mr. Tabler's father, reported that Lorraine drank during pregnancy. ROA.1435.
- Mr. Tabler's classroom and standardized test performance were abysmal. ROA.1447-52.
- A treating psychologist found that he had severe attention deficits as a teen. ROA.1460.
- An EEG revealed slow brain waves in the left frontal-temporal region. The expert indicated that those deficits would impair learning and planning. ROA.1417.
- Mr. Tabler had impaired scores on tests of executive functioning and memory. ROA.1422.

If counsel had conducted the investigation that these details demanded, they would have learned much more about the devastating interactions among his congenital defects, life circumstances, and mental and emotional disorders. *See Porter*, 558 U.S. at 40 (counsel deficient, in part, for ignoring information that should have prompted further investigation); *Wiggins*, 539 U.S. at 525 (counsel

deficient for not following up on information). The additional information should have led them and their experts to focus on medical and developmental problems:

- Lorraine conceded, and friends and family confirmed, that she drank repeatedly during her pregnancy with Richard. ROA.2499, ROA.2505, ROA.1435.
- Richard was slow to walk and talk, sucked on two fingers well into his teens, struggled to speak, and still wet the bed at age eight. ROA.2500, ROA.2509, ROA.2524, ROA.1443-44.
- He curled up in a fetal position and rocked himself. ROA 1444.
- He skipped or refused meals and showed little interest in food. ROA.2509-10, ROA.1444.
- Even after puberty, he did not shave and his voice did not change. ROA.2509, ROA.2522, ROA.1444.
- He had early, severe dental problems and lost all his upper teeth by age 22. Corrections officials had to extract lower teeth as well. ROA.2506, ROA.1460, ROA.1465.
- He had hand tremors throughout his life. ROA.2507, ROA.1444.
- Richard endured infant-like tantrums well into middle childhood. His eyes rolled back and he collapsed onto the floor and sometimes lost consciousness. Some lasted for hours. ROA.2500, ROA.2520, ROA.2525, ROA.1444.

- He had inappropriate social reactions and wide mood swings. ROA.2483, ROA.2485, ROA.2511, ROA.1445.

Counsel had no strategic reason not to investigate Mr. Tabler's medical and mental health and present the results to experts and jurors. Indeed, their strategy was to show he was biologically impaired. Counsel promised in opening to demonstrate that he was not "normal" and asked Dr. Proler if he had brain damage. ROA.6741, ROA.6869-70. Both counsel argued in summation that Mr. Tabler had a "medical condition" and "could not control" his behavior. ROA.7053, ROA.7061-62.

Nevertheless, counsel deficiently implemented their own strategy. They failed to inquire into symptoms of mental and medical illness, and thus of necessity never consulted any expert about what the investigation revealed. They never learned of Richard's hallmark signs of KS and FASD, and accordingly never consulted any expert about them. And they left their experts vulnerable to withering cross-examination and summation derision because they never provided the many, many firsthand accounts that substantiated the diagnoses of borderline personality disorder, bipolar disorder, and attention deficit disorder found in the records.

Counsel's deficient investigation of and consultation about Mr. Tabler's medical and mental health prejudiced his penalty phase defense. A reasonably complete mental health investigation and presentation could have provided support for their own experts and led to diagnoses of KS and FASD. The experts could have

helped the jurors understand Mr. Tabler three-dimensionally instead of leaving them to work with the prosecution's flat caricature while deciding his fate.

First, if trial counsel had conducted an investigation of medical and mental health they could, at a minimum, have learned of firsthand accounts by numerous witnesses who could have substantiated the diagnoses reflected in his records (on which their own experts relied), and could have established that he went through life burdened by one impairment superimposed on another. Mr. Tabler's mother, his sister, his brothers, one brother's ex-wife, his mother's friend, his sister's friend, Mr. Tabler's friend and the friend's parents, two elementary school teachers and two elementary school administrators, two elementary school classmates, and one of his mother's boyfriends could all have described specific behaviors they personally witnessed. ROA.2482-2542. If counsel's experts could have relied on these witnesses' evidence to support their diagnoses, they could have withstood cross-examination.

Instead, the lack of supporting information severely undercut the experts' credibility. For example, Dr. Proler admitted that he had not reviewed records and could not give the cause of the abnormal brain waves on EEG exam. ROA.6868-69. He testified on redirect that he could not say whether Mr. Tabler had brain damage without further tests. Dr. Stone, on cross-examination, had to admit that she had not spoken to family members and the only background information supplied by counsel

was "basically an outline." ROA.6895-96.[8] Similarly, Dr. Jacobvitz admitted that she had not verified information Mr. Tabler had given her. ROA.6978.

Both Dr. Proler and Dr. Stone heavily qualified their original opinions. ROA.6864, ROA.6907-19. Defense counsel went beyond mere qualification to complete retreat in summation, embracing the testimony of the prosecution expert, Dr. Coons, and describing his client as a "sociopath." ROA.7052-53. The prosecutor made vigorous use of the concession. ROA.7067.

But for counsel's deficiencies, their experts could have answered the question, "Does he have brain damage?" with an unequivocal "yes." *See* ROA.1622, ROA.1636. Counsel could have supported their own strategy of showing an "abnormal brain" with both firsthand observations and informed expert testimony, and need not have abandoned their strategy in favor of the prosecution's. *See Walbey*, 309 F. App'x at 803-04 (unprepared expert unaware of mitigating evidence counsel failed to uncover "did severe damage to Walbey's case"; prejudice found); *see also Sears*, 130 S. Ct. at 3267; *Porter*, 130 S. Ct. at 454; *Adams*, 324 F. App'x at 351.

[8] The outline appears at ROA.1724. It is a chronology prepared by mitigation investigator Byington from records, supplemented with entries derived from one meeting with Lorraine Tabler.

The prejudice in Mr. Tabler's case, however, went much deeper than merely leaving the experts awkwardly hanging on cross-examination. Counsel never even learned that Mr. Tabler was handicapped from the womb with an endocrine system and central nervous system that crippled his ability to regulate his conduct, control his emotions, relate to others normally, pay attention, or succeed in school. As a result, he was at heightened risk for secondary disabilities that, in his case, included substance abuse, other mental health problems, dependent living, poor work history, and confinement. And, because counsel never uncovered the information that would have led to these medical diagnoses, their experts remained equally in the dark.

Trial counsel's neuropsychologist, Dr. Daneen Milam, has described the impact that information about Mr. Tabler's medical disorders could have had on her 2006 evaluation:

> Mr. Tabler's ADHD, Klinefelter Syndrome and his Alcohol Related Neurodevelopmental Disorder (ARND) was and is a medical problem and was not the result of a lack of will power. These disorders are a biological and chemical malfunction in an immature brain. The effects of Mr. Tabler's genetically and biologically determined impulsive and distractible response style was aggravated, no doubt, by the chaotic, traumatic home environment in which he spent his formative years.

ROA.2541-42. Mr. Tabler's "pattern of scores might have been addressed in a completely different context," and the information Dr. Milam never received could have had a significant impact on her interpretation of the test results. ROA.2539, ROA.2542.

Because trial counsel had no idea of the truth, however, their experts had no idea of the truth either. The jurors, in turn, never knew that behind the chaotic upbringing barely sketched by the defense experts lay medical illnesses with roots in Mr. Tabler's biology and his genes. The picture they received at the penalty phase was inaccurate and incomplete.

The district court rejected Mr. Tabler's claim, in part, because it mistakenly believed that his proffered experts had not indicated that they were "available and willing to testify to the contents of their affidavits at trial." ROA.7473. In fact, all of them, except Dr. Milam who was actually consulted by trial counsel, have stated that they were available and willing. ROA.2526; ROA.2530; ROA.2531; ROA.2532, ROA.2535.

The district court also ruled that *Strickland* does not require counsel to shop for more favorable experts and counsel could rely on their own experts' opinions. ROA.7473. Mr. Tabler does not argue, however, that counsel should have sought other experts or rejected their own. He argues they conducted a deficient investigation and gave their own experts insufficient information for complete, well-supported conclusions. Dr. Milam's declaration exemplifies the powerful opinions counsel could have presented if their own experts had received the fruits of an adequate investigation. Moreover, Mr. Tabler does not argue that counsel adopted

the wrong theory; they promised the jurors they would show that he had a damaged brain. Their deficient investigation, though, made them unable to fulfill that promise.

The district court expressed skepticism that an adequate investigation would have uncovered Mr. Tabler's medical disorders because treating professionals had never uncovered them during his early life (ROA.7474), but that reasoning misapplied both the performance and prejudice prongs of *Strickland*. Trial counsel were deficient because they limited their investigation and failed to follow up on indications that medical and mental health investigation would bear fruit. The notion that they still might not have uncovered the diagnoses misapplied the *Strickland* prejudice test in the guise of a deficient performance analysis. The different outcome was still reasonably probable.

The district court also reasoned that "the jury was not left without an explanation for Petitioner's inability to control his behavior." ROA.7476. The explanations they received, however, were incomplete or inaccurate, poorly supported, and less mitigating. The best Dr. Proler could say was that the single EEG result indicated that Mr. Tabler "more than likely" had brain damage, but he could not say more without further testing. ROA.6860. The prosecutor focused on this weakness in cross-examination and harped on it in summation. ROA.6868-70, ROA.7069-70. Testing and adequate investigation could have established that Mr. Tabler definitely has an abnormal, highly impaired brain. Dr. Stone's descriptions

of ADHD, bipolar disorder, and borderline personality were based only on records and were ridiculed by the prosecution for that reason. ROA.6895-96, ROA.7069-70. Furthermore, Mr. Tabler's ADHD was only one manifestation of his multi-layered medical illnesses. Many individuals with ADHD can lead constructive lives. Mr. Tabler, because of his many other medical and mental health infirmities, could not.

Finally, the district court ruled that a weighing of the available mitigating evidence against the aggravating evidence demonstrates that Mr. Tabler suffered no prejudice. ROA.7477 (quoting *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002)). This logic ignores precedents of the Supreme Court, which has repeatedly found prejudice resulting from counsel's failure to investigate and introduce mitigating evidence, even in highly aggravated cases. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 778 (2017); *Porter*, 558 U.S. at 42; *Rompilla*, 545 U.S. at 378; *Wiggins*, 539 U.S. at 514–15; *Williams*, 529 U.S. at 418. Indeed, this Court has rejected this argument as a "non-starter." *Walbey*, 309 F. App'x at 804 (quoting *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001)).

Demonstrating the fallacy of the district court's reasoning, juries in Texas and around the country have voted for life even in some of the most disturbing capital prosecutions, *See* Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases,* 46 Hofstra L. Rev. 1161, appendices at 1229-1256 (2018)

(cataloguing nearly 200 aggravated capital trials that resulted in life sentences, including 80 cases with multiple victims); *see Garcia v. State*, No. 03-08-00586-CR, 2010 WL 4053640, at *3-4 (Tex. Ct. Crim. App. Oct. 12, 2010); *Saenz v. State*, 421 S.W.3d 725, 733 (2014). No set of facts is so barbaric and no defendant so unsympathetic that a capital sentence is inevitable. This Court should reject the district court's conclusion that the aggravating facts of this case preclude a finding of prejudice.

It is reasonably probable that, if the jurors had understood that Mr. Tabler has a genetic disorder, about which he had no choice, and another congenital disorder, about which he had no choice, and that these medical illnesses exponentially magnified the impact of the many tough blows his life has dealt him, they would have imposed a life sentence. *Strickland*, 466 U.S. at 694. Mr. Tabler has stated a claim for habeas relief both on this ground alone and in combination with the other grounds in this application. At a minimum, jurists of reason could conclude the claim deserves encouragement to proceed further. This Court should accordingly grant COA on this ground, and also consider it in combination with the other grounds in this application.

3. Counsel Inadequately Prepared and Presented Expert Witnesses, Exposing Them to Devastating Cross-Examination.

Trial counsel not only failed to provide their experts with the fruits of adequate investigation, but even in light of the records they possessed, failed to prepare them adequately, rehabilitate them with available evidence, or object to the prosecutor's irrelevant and prejudicial cross-examinations. These failings occurred repeatedly and, cumulatively, severely discredited counsel's own chosen theory of the case.

An effective attorney has a duty to do more, when a case requires expert opinion, than merely retain and call an expert witness. Effective counsel must adequately prepare and present the expert's testimony. *See Walbey*, 309 F. App'x at 803 (counsel deficient for inadequately preparing mental health expert and failing to rehabilitate him); *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007) (counsel did not explore or test basis for expert's opinion, and thus failed to take requisite reasonable steps to present expert testimony to fact-finder).

Mr. Tabler's counsel repeatedly fell short of this standard. For example, Dr. Proler assessed the EEG data in two ways. First, he performed a traditional "objective" assessment in which he visually inspected the data and used his informed judgment about its significance. Second, he conducted a quantitative evaluation that he described on cross-examination as "not as accepted in the community" and "probably not admissible." ROA.6864. As trial counsel knew, the prosecution knew

about both assessments because they had submitted Proler's affidavit as an exhibit to a pretrial motion. ROA.3892, ROA.3927. Proler blended the qualitative and quantitative results in his written discussion, although, as he later testified, the objective analysis alone independently supported his conclusion of brain abnormality. ROA.6859-60.

Nevertheless, counsel took no steps to limit the jurors' exposure to the potentially inadmissible part of Proler's analysis or the damaging cross-examination. Counsel never moved *in limine* to determine its admissibility and never objected that the cross-examination about it was outside the scope of direct, irrelevant, and prejudicial. Counsel abandoned an effort to rehabilitate Dr. Proler without asking him to explain how the objective and quantitative analyses differed and why the controversy applied only to the quantitative type. The prosecutor responded with derision when the doctor attempted to explain that he had testified based only on the objective analysis: "You signed an affidavit . . . that talked about the quantitative analysis, and now you're telling everybody that maybe the Court ought to just ignore that?" ROA.6865.

Counsel's preparation and presentation of Dr. Stone was also deficient. First, she could not identify the records that supported her opinion that Mr. Tabler had ADHD and had no response when the prosecutor suggested they did not reflect that diagnosis. ROA.6906. In fact, school records did document the diagnosis,

symptomatic classroom behaviors, and "off the charts" results on an ADHD screening test. ROA.1697, ROA.1687-94. Counsel never questioned Dr. Stone about them.

Second, the prosecutor challenged Dr. Stone's conclusion that Mr. Tabler suffered from bipolar and borderline personality disorders and suggested that the mental health records more consistently reflected ASPD. ROA.6909-11, ROA.6919. Again, trial counsel never on either direct or redirect called the doctor's attention to numerous records supporting her conclusions. *See, e.g.*, ROA.1803, ROA.1837-48.

Counsel neither anticipated nor reacted to questions about Dr. Stone's failure to interview anyone in Mr. Tabler's family. ROA.6896. Either he failed to give her Dr. Jacobvitz's report reflecting family interviews or he did provide them and failed to elicit that information during direct or redirect examination.

Finally, counsel either failed to turn over Dr. Stone's notes, violating discovery rules,[9] or he failed to rehabilitate her after damaging cross-examination about them. The prosecutor asked why she had not turned them over, 28.RR.65, then asserted she knew the State was entitled to them but had not provided them, *id.*, and then asked the judge to order her to turn them over. 28.RR.86. The questions

[9] As counsel knew or should have known, a defendant may be required to disclose an expert witness's notes if the witness makes testimonial use of them at trial. *See Morrison v. State*, 575 S.W.3d 1, 13 (Tex. App. 2019) (citing cases).

suggested that either the doctor or the defense had flouted court rules, but counsel did nothing to forestall that negative inference. Either it was true, and counsel had failed to provide the notes, or it was false, and counsel failed to correct the inaccurate impression. In either case, counsel was deficient.

The district court rejected this claim as "exactly the type of second-guessing and hindsight that *Strickland* prohibits," and reasoned that evidentiary issues are strategic matters that will usually not support an ineffective assistance claim. According to the court, additional questioning of each witness was unnecessary "given the substantial mitigating evidence counsel had already elicited[.]" ROA.7480-81.

The court failed to appreciate the context of counsel's courtroom failings or their cumulative deficiencies. As previously discussed, the records counsel collected contained many strong prompts requiring follow-up investigation of Mr. Tabler's background and mental health symptoms. Counsel ignored the prompts and conducted almost no investigation. The district court rejected the investigation-based ineffective assistance claims on the ground that counsel could reasonably rely on their experts. However, even if counsel could reasonably forego a clearly indicated background and mental health investigation in favor of a thorough records-based presentation and an EEG exam, that did not happen here. Counsel's failure to prevent or respond to inaccurate attacks on their experts with obvious facts from the records

and testing suggests that they were unprepared and unfamiliar with what the records and test results contained. Either way, though, they were deficient: either they unreasonably failed to prepare or they unreasonably failed to make use of helpful record-based information they knew about to demonstrate the bases for their experts' opinions.

The district court also concluded that Mr. Tabler had not demonstrated prejudice. Its conclusion repeatedly misstated the constitutionally required prejudice test:

> In any event, even assuming counsels' performance could be considered deficient for their handling of the experts' testimony, Petitioner fails to demonstrate that ***the results of the proceeding would have been different*** had counsel prepared and rehabilitated their experts in the manner Petitioner now suggests. *Strickland*, 466 U.S. at 694. . . . In situations such as this, where evidence of future dangerousness is overwhelming, it is difficult to establish *Strickland* prejudice. *Ladd*, 311 F.3d at 360. ***There is therefore no merit to Petitioner's assertion that the results of the punishment phase would have been different*** had counsel prepared and rehabilitated their experts differently.
>
> In short, Petitioner fails to demonstrate that counsel were deficient ***or that the results of the punishment phase would have been different*** had counsel prepared and rehabilitated their experts as he now suggests.

ROA.7482 (emphases added). Mr. Tabler had no burden to prove conclusively that the outcome would have differed but for counsel's deficiency; the Supreme Court has repeatedly stated that a reasonable probability, one less than more likely than not, is the test. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011). Furthermore, the

district court failed to assess prejudice cumulatively. Not only did counsel's failure to "prepar[e] and rehabilitat [e] their experts differently" have a devastating impact on the testimony of each expert individually, but these failings formed part of a pervasive pattern. Counsel's failure to conduct a constitutionally adequate background investigation *and* their failure to conduct a blatantly necessary medical and mental health investigation *and* their failure to use the records they possessed to prepare and rehabilitate their experts, together, left the jurors in the dark about two congenital illnesses and voluminous anecdotal and record-based information that supported the other diagnoses the experts pulled from the records and testing.

Counsel's entire sentencing theory was that Mr. Tabler was not "normal." Counsel's failure to prepare and rehabilitate the experts, along with their foundational investigation-related deficiencies, prevented the jurors from developing a full understanding of Mr. Tabler's longstanding, debilitating mental illnesses, and it left them vulnerable to the prosecutor's theory that he was simply a manipulative sociopath. There is a reasonable probability that if the jurors had learned everything a reasonable investigation and presentation would have made available, they would have reached a different verdict in spite of the aggravating facts on which the district court so heavily relied. Counsel's deficient performance respecting the experts at trial therefore prejudiced the penalty phase defense individually and in combination with their other deficiencies. Reasonable jurists

could at least debate that question. This Court should therefore grant COA on this ground, individually and cumulatively with the other instances of deficient performance set forth in this pleading.

4. Trial Counsel Failed to Challenge Inadmissible Victim Impact and Character Evidence Relating to Victims Not Named in the Indictment.

The district court granted a COA on this claim. ROA.7506-07. Mr. Tabler explains in the *Brief on the Merits* why this omission alone was deficient performance that prejudiced the defense. Moreover, the district court failed to consider counsel's pervasive pattern of defective advocacy. Even if this instance or any of the other instances of unreasonable conduct was not deficient individually, they collectively constituted deficient performance. In addition, counsel's failings, together, cumulatively prejudiced the defense at the penalty phase. Accordingly, this Court should consider the prejudicial impact of this poignant, inflammatory, but inadmissible testimony cumulatively with prejudice contributed by the other grounds of ineffective assistance on which Mr. Tabler seeks COA.

5. Counsel Disparaged Their Client, Abandoned Their Own Experts' Opinions, and Adopted the Prosecution Expert's Opinion.

a. Facts

Trial counsel's deficient advocacy did not stop at failing to investigate, prepare, and present a constitutionally adequate mitigation case or to protect their

witnesses from the prosecutor's cross-examination and summation attacks. In their own summations, they effectively joined the prosecution themselves.

Lead counsel Harris began his closing by expressing sympathy for the victims and their families; then he proceeded to refer to his client as "it" eight times in one paragraph, telling the jury that "it" was broken and could not be fixed, and "It was probably broken before it was born." ROA.7048. Next, instead of explaining why the jurors should accept and give weight to the defense experts' opinions, he abandoned them. He expressed ignorance about Dr. Proler's generally accepted objective analysis and provided no explanation of the questioned quantitative analysis. ROA.7049-50. Mr. Harris then told the jury to endorse the State's *cross-examination* of his expert Dr. Stone—that the appropriate diagnosis of Mr. Tabler was ASPD because it "fit him like a glove." ROA.7050.

Mr. Harris's discussion of the third defense expert, Dr. Debra Jacobvitz, was both inflammatory and offensive. After telling the jury that he [Harris] had had a wonderful father he stated:

> Richard Tabler didn't have that luxury. He didn't have it. In fact, if you want to throw this out on the table top, the first conscious thought his father had of him was abort *it*. Throw the baby out with the bath water. Go see Dr. Quackenstein at the end of the dirt road, give him the $50, and flush the use - - now that's a little harsh. I'm sorry. If I have offended your sensitivity, they mean to kill my client.

ROA.7050-51.

Then, instead of explaining why the opinions of the defense experts were more valid than that of the State's expert, he said that one paid opinion is not any more or less right than any other. He made these arguments in a manner highly offensive to the integrity of his own experts: "[A]ll we can do is dance them to that witness stand, let them talk to you, and you make a decision, not me." ROA.7052.

Not once in his closing did Mr. Harris discuss Dr. Stone's diagnoses of bipolar disorder, borderline personality disorder and ADHD—all of which had ample support, not only in her expert opinion, but also in mental health records prepared over the course of Mr. Tabler's adolescence and youth. In other words, counsel abandoned his own theory of mitigation.

Mr. Harris then proceeded beyond abandoning the defense to joining the prosecution: "We know he has an abnormality of his frontal quadrant of his brain. It means in all likelihood that he's a sociopath." ROA.7053. Apparently attempting to put a positive spin on "sociopath," Mr. Harris argued that "there was a time when if you were called a sociopath, that was a green light right on down to old spark, strap him in, turn it on, and *let's fry some marshmallows*." *Id.* Co-counsel Donahue, too, adopted the State's experts' opinion, telling the jurors that Mr. Tabler had "the classic symptoms" of antisocial personality disorder. ROA.7061.

In summation, the prosecutor made vigorous use of defense counsel's abandonment of their mental health experts and adoption of the prosecution's theory.

The prosecutor stressed that a person with ASPD is a calculating sociopath with no remorse. ROA.7085. He observed that not once did Mr. Harris or Mr. Donahue say anything about Mr. Tabler's bipolar disorder, and that Dr. Coons had labeled Mr. Tabler a classic case of ASPD. "Those are the folks that make up death row" because they are "*sociopath[s]*" and "do not care." ROA.7070, ROA.7081.

b. Counsel were ineffective.

Counsel's closing arguments debased their client and contradicted their own strategy. Numerous courts have recognized that, because ASPD suggests chronic criminality and incapacity for rehabilitation, the diagnosis is aggravating, not mitigating.[10] Counsel's summation adoption of that aggravating theory, in place of the mitigating theory they initially undertook to advocate, was deficient performance. *See Rickman v Bell*, 131 F.3d 1150 (6th Cir. 1997) (affirming 864 F. Supp. 686 (M.D. Tenn. 1994)) (counsel showed such contempt for client that he became "second prosecutor," and defendant would have been better off without counsel); *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (counsel ineffectively conceded in closing argument that there was no reasonable doubt); *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. Dist. Ct. App. 2011) (counsel

[10] *See, e.g., Walbey*, 309 F. App'x 795; *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217 (11th Cir. 2010); *Cummings v. Sec'y for Dep't of Corr.*, 588 F. 3d 1331, 1368 (11th Cir. 2009); *Weeks v. Jones*, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994); *Guinan v. Armontrout*, 909 F.2d 1224, 1230 (8th Cir. 1990); *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988); *Eddings v. Oklahoma*, 455 U.S. 104, 126 n.8 (1982) (Burger, C.J., dissenting).

ineffectively conceded defendant was guilty of robbery and burglary when stated strategy was to concede only theft); *People v. Woods*, 502 N.E.2d 1103 (Ill. App. Ct. 1986) (counsel ineffectively conceded that defendants were guilty of theft); *see also ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.11(F), pp. 1055-1056 (2003).

In sum, "no competent capital defense attorney would ever pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment." Kathleen Wayland & Sean O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 Hofstra L. Rev. 519, 530 (2013). Effective counsel would have endorsed their own experts. They would have explained that Mr. Tabler suffered from earliest childhood from multiple superimposed mental health disorders that impaired his ability to control his behavior and mitigated against imposition of the death penalty. At the very least, effective counsel would have refrained from calling their client "it" and making jocular remarks about frying marshmallows. Counsels' decision to abandon the evidence of their experts and endorse the non-mitigating and inappropriate diagnosis of ASPD was unreasonable and could not have arisen from any reasonable strategy.

Trial counsel's deficient summation prejudiced Mr. Tabler's case for life. Not only did counsel conduct a deficient investigation that failed to uncover congenital

medical illnesses and abundant evidence supporting his other diagnoses; and not only did counsel deficiently prepare and present uninformed expert testimony; and not only did counsel allow the jurors to hear inadmissible victim impact evidence; but they actually adopted the inappropriate, highly aggravating diagnosis of the prosecution's expert. The prosecutor made sure to capitalize on this concession.

The district court ruled that counsel's summation was neither deficient nor prejudicial because both counsel "repeatedly insinuated . . . that Petitioner should not be given the death penalty because he was 'flawed' and 'not normal.'" ROA.7501. While counsel may not have abandoned the general argument that Mr. Tabler was not "normal," they did abandon their own experts' diagnoses and adopt the State's expert's diagnosis. As Mr. Tabler was prepared to show at an evidentiary hearing, no strategy could justify that about-face. The prosecutor's summation remarks, calling the jurors' attention to the defense's changed course, shows how damaging their abdication was.

Individually and cumulatively with the other claims in this petition, counsel's deficiencies prejudiced the penalty phase defense. At a minimum, because reasonable jurists could differ, this Court should grant COA on this ground along with the other grounds in this pleading.

CONCLUSION

This Court should expand COA to include the procedural grounds in Point I, individually and in combination with the procedural ground in Point I of the *Brief on the Merits*. It should also expand COA to include the claims for relief in Point II, individually and in combination with the claim in Point II of the *Brief on the Merits*. For all these reasons, Mr. Tabler should receive a hearing and, ultimately, habeas relief on his claims.

Respectfully submitted,

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Dated: August 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this date, I served the foregoing pleading on the following by operation of the electronic case filing system:

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Dated: August 1, 2022